A LEGAL ANALYSIS OF LOSS OF UNITED STATES NATIONALITY AS A RESULT OF UNAUTHORIZED SERVICE IN THE ARMED FORCES OF A FOREIGN STATE.

by

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I Introduction: Loss of Nationality as an International Law and a Domestic Law Problem

Nationality, as a legal concept, is a term applied to the identity relationship of an individual with a particular Nation-State. Thus, nationality law is that authoritative process which defines the legal relationship, entailing rights and duties, which exists between the individual and the State conferring its nationality. The decision as to who is, and who is not, entitled to the benefits and privileges of the nationality of a particular State is inherently a domestic law question,[1] subject to reasonable standards of effective connection between the individual and the Nation-State whose nationality is claimed.[2]

The Convention on Certain Questions Relating to the Conflict of Nationality Laws, adopted at the Hague Conference for Codification of International Law on 12 April 1930, provides:

> "Art. 1. It is for each state to determine under its own law who are its nationals. This law shall be recognized by other states in so far as it is consistent with international conventions, international customs, and the principles of law generally recognized with regard to nationality.
>
> Art. 2. Any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that state."[3]

As stated by Oppenheim, "It is not for International Law, but for Municipal Law to determine who is, and who is not, to

be considered a subject."[4] The right to delimit those individuals who are considered to be its nationals is an essential element of State sovereignty. Sovereignty, which has been described as "the supreme and independent authority of States over all persons and things in their territory",[5] implies perforce the personal supremacy of a State over its nationals in defining their status and in prescribing their rights and duties.

However, by virtue of the freedom of action given to States with respect to questions concerning nationality, conflicts between provisions of domestic legislation relating to nationality frequently arise between States on the international plane.[6] Thus, questions of nationality are not relegated solely to the municipal sphere, and rules of international law regulating the manner in which nations resolve conflicts of nationality law can be deduced from the practive of States, international conventions and the decisions of international tribunals. As stated by Weis in his treatise on this subject, these rules do not operate directly upon individuals in conferring or withdrawing nationality; they are, rather, primarily "negative rules, restricting the freedom of States to confer or withdraw nationality."[7]

Nationality in its legal sense may only be conferred by a Nation-State, and thus, must be distinguished from the concept of nationality which entails ethnic ties.[8] Weis states:

> "The term 'nationality'...[as] a politico-legal term denoting membership of a State ...must be distinguished from nationality as a historico-biological term denoting membership of a nation. In the latter sense it means the subjective corporate sentiment of unity of members of a specific group forming a 'race' or 'nation' of a territory and which, by seeking political unity on that territory, may lead to the formation of a State.
>
> Nationality in that sense, which is essentially a conception of a non-legal nature belonging to the field of sociology and ethnography, is...[to be differentiated]...."[9]

The subject of nationality has given rise to a vast wealth of legal literature on the planes of both municipal and international law, and it may be anticipated that questions involving nationality will continue to occupy the attentions of municipal and international authoritative decision-makers (e.g., judges, arbitrators, public officials) for as long as the concept of the Nation-State exists in law. Nor are such issues necessarily isolated problems, for they may have constitutional, diplomatic and political consequences (to name but a possible few) which are of profound import.

A current example of the foregoing may be seen in the accusation by Arab governments and organizations that the United States is encouraging its citizens to serve in the armed forces of Israel. Such encouragement is said to be based on the alleged refusal of the United States to deprive its citizens of their citizenship for service in foreign

armed forces, despite the fact that expatriation is statutorally prescribed for such activity. The Arabs claim that, by permitting its citizens to serve in the Israeli armed forces, the United States has departed from a position of impartiality in the continuing international conflict in the Middle East, and is actively espousing the aims of Israel.

> "Before the meeting /of the Arab League Joint Defense Council/ went into closed session, Abdel Khalek Hassouna, the Arab League's secretary general, denounced the United States over a two-year-old court decision that Americans need not automatically lose their citizenship through service in foreign armies. Arabs charge that the decision was taken to permit Americans to volunteer for the Israeli armed forces."[10]

> "'This participation (of American citizens in Israeli services) is contrary to international law principles, resolutions of the United Nations and American interests in the Arab world,' Hassouna said."[11]

The accusation was carried even further by another Arab official:

> "Sudanese Secretary of State Farouk Abou Bissa, who chaired the meeting /of the Arab League Joint Defense Council/, told the opening session, 'the United States has put itself willingly in a position of direct confrontation with Arab nations. It has become very clear the United States is Arab enemy number one and it is now for Arabs to determine or define their attitude toward the United States', Bissa said. Bissa charged America not only delivered arms and money to Israel but 'has mobilized its sons to serve in the Israeli army'."[12]

This criticism of the United States is the result of an interpretation placed on the decision of the United States Supreme Court in the case of Afroyim v. Rusk,[13] an interpretation which appears to be accepted in the statements of officials of the United States Government.[14] In Afroyim, the Supreme Court condemned, and effectively held unconstitutional, Section 401(e) of the Nationality Act of 1940 (Oct. 14, 1940, c.876, 54 Stat. 1168, as amended 58 Stat. 746) which prescribed loss of nationality for any United States citizen who voted in a foreign political election.[15]

Contrary to the news article quoted above, the Supreme Court did not rule that "Americans need not automatically lose their citizenship through service in foreign armies". However, the decision in Afroyim has been interpolated to extend its proscription to other sections of the Immigration and Nationality Act of 1952, particularly Section 349 (a)(3), (8 U.S.C. §1481(a)(3)), which provides that a United States national shall lose his nationality by entering, or serving in, the armed forces of a foreign state without obtaining the prior, written permission of the Secretaries of State and of Defense. Such an interpolation would hold that expatriation for foreign military service is also unconstitutional and that the provision is, a fortiori, unenforceable. This view has apparently been adopted by the United States Department of State and Department of Justice,[16] and Arab leaders have

drawn their own conclusions from it with regard to United States Middle East policy.

Thus, the question of United States citizenship and nationality, which is generally considered a matter of municipal law and domestic jurisdiction, is vaulted upon an international stage as a factor in an ongoing competition of exclusive interests in the Middle East. Especially does the question of nationality appear to be one of municipal law where the issue does not involve the conferring of nationality and the assertion of the attendant right of protection of an individual by one State in opposition to the claims of another State, but instead concerns the deprivation of its own nationality by a State for its own purposes.

However, the problem posed the United States and its decision-makers by the Arab allegations is not eliminated by labelling the matter a question of domestic law. By virtue of the fact that the constitutionality of automatic expatriation for the performance of certain acts under United States law has become an issue of international contention, the matter becomes of immediate concern in international law. As long as nations advocate the resort to law and its processes of authoritative decision making in maintaining a world public order free from coercion and violence, it is international law to which we must turn in resolving disputes.[17] Preliminarily, however, the provisions and requirements of United

States law must be examined in an effort to determine whether the conflict can be eliminated by domestic action on the part of United States officials.

Subsequent examination of this problem will necessitate an appraisal of sources of public international law bearing on the withdrawal of nationality by a unilateral act of State, and of the guidance provided by international human rights standards.

II United States Law governing the Loss of Nationality

A. The Immigration and Nationality Act of 27 June 1952

1. Provisions

The Immigration and Nationality Act (66 Stat. 163), enacted into law over Presidential veto on 27 June 1952, provides in Chapter 3 for the loss of United States nationality by the performance of certain acts, or the fulfillment of certain conditions, specified in the chapter. Such loss of nationality is to be automatic. As declared in Section 356 of the Act:

> "The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter."[18]

Inter alia, Section 349 of the Immigration and Nationality Act provides:

> "(a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> ****
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: Provided: That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth

birthday;[19] or

****

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory;[20] or ...."

2. Legislative History

While Section 349(a)(5) of the Immigration and Nationality Act of 1952 is a re-enactment in exact terms of Section 401(e) of the Nationality Act of 1940, Section 349(a)(3) is distinctly different from its counterpart in the 1940 Act, Section 401(c). That section of the Nationality Act of 1940 provided:

"Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

****

(c) Entering or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or ...."

Thus, while prior statutory authority conditioned loss of United States nationality for service in foreign armed forces on having or obtaining the nationality of the foreign state in whose armed forces the individual served, present provisions admit of the creation of a class of stateless persons -- those who serve in a foreign armed force but do not acquire the foreign state's nationality.

Congressional debate prior to passage of the Immigration and Nationality Act of 1952 was long and acrimonious.[21] However, discussion of the provisions of the proposed legislation focused primarily on the restriction of immigration quotas by national origin, and on the alleged racial discrimination which such restrictions represented by favoring immigrants of Anglo-Saxon and northern European ancestry. Also of prime concern in debate were the broad powers given the United States Attorney General in matters of visa issuance and deportation of aliens. These provisions of the popularly known McCarran-Walter Bill were the subjects of extended debate in the House of Representatives and, particularly, in the Senate. (In opposition to this proposed legislation in the Senate were the proponents of the more liberal Humphrey-Lehman Bill.) Yet despite the plethora of argument, nowhere in the debate were the provisions of Section 349(a)(3), concerning foreign armed service, ever specifically discussed. During one portion of the debate, Senator Humphrey offered for the Senate's consideration a memorandum prepared by the Subcommittee on Immigration of the American Bar Association, concerning possible constitutional objections to provisions of the McCarran-Walter Bill. No mention was made in this memorandum concerning loss of nationality as the result of service in foreign armed forces.[22]

The report of the House Judiciary Committee accompanying

H.R. 5678, 82nd. Congress, 2nd. Session (1952), which was the version of the Immigration and Nationality Act passed by the House of Representatives and, with some modification, by the Senate, contains simply the statement with reference to Section 349(a)(3):

> "Loss of Nationality -- Other Than By Judicial Revocation
> 1. Loss of Nationality by native-born and naturalized citizens
> The Nationality Act of 1940, as amended, lists 10 acts by which nationals, whether native-born or naturalized, divest themselves of their nationality. The bill continues in effect, with modifications hereinafter explained, the provisions of the Nationality Act of 1940 relating to acts which cause loss of nationality, but includes provisions under which a person who commits certain expatriating acts while under 18 years of age may repudiate those acts and thus preserve his United States citizenship.
>
> ****
>
> The third act causing loss of nationality is entering or serving in the armed forces of a foreign state unless expressly authorized to do so by the laws of the United States. The bill requires, in lieu of general authorization, that a specific authorization in writing must be made by the Secretary of State and the Secretary of Defense before a national of the United States may enter or serve in the armed forces of a foreign state without losing his status as a national of the United States. The bill contains a new provision that a national under 18 years of age shall lose nationality by service in the armed forces of a foreign state only if there exists an option to secure a release from such service and he

"fails to exercise that option when
he becomes 18 years of age."[23]

In hearings on the proposed Immigration and Nationality Act, held by the Joint Subcommittees of the Committees on the Judiciary of the Senate and House of Representatives, very little comment was made with respect to the provision providing for loss of United States nationality through service in foreign armed forces. One proposal bearing on Section 349(a)(3) of the bill, which was submitted by Assistant Secretary of State Jack K. McFall, would have inserted a new subsection (e) under Section 324 of the bill for the purpose of permitting persons who lost their United States nationality under certain subsections of Section 349 (a) to return to the United States within five years as nonquota immigrants for the purpose of recovering nationality through naturalization. A proviso to this proposed subsection, however, would have withheld the privilege of returning from one who lost United States nationality by serving in the armed forces of a country engaged in hostilities against the United States.[24] The proposal was substantially incorporated in the bill as Section 327.[25]

Another proposal with respect to Section 349(a)(3) was submitted by Henry I. Butler, who appeared before the Joint Subcommittees as a member of the Legislative Committee of the National Council on Naturalization and Citizenship. Mr. Butler

suggested that the authorization to serve in foreign armed forces "should be by either the Secretary of State or the Secretary of Defense in the alternative, rather than by both in the conjunctive; and their authorization should be as an alternative to authorization by the laws of the United States, and it should not be required prior to such entry."[26]

Mr. Butler was particularly concerned with preserving the nationality status of Americans who served in the armed forces of countries which subsequently became allies of the United States in international hostilities, as witness the following exchange during his oral testimony:

> "Mr. Butler. ....Now, for example, this country owes a vast debt of gratitude to very many loyal United States citizens who joined the Allied forces both before the entry of the United States into World War I and into World War II. At the time those people entered the service of the foreign countries, it is a foregone conclusion that no Secretary of State and no Secretary of Defense would have given them written permission, nor would Congress have enacted laws authorizing them to do so prior to our entering into the conflict.
>
> If, at a later date, this country finds those men served this country as fully as though they had served in our own Army, then such permission, either by an act of Congress, or by either the Secretary of State or Secretary of Defense should suffice. It is suggested that such liberality would not prejudice this country, because no such permission would be granted if they had entered any forces hostile to this country. If they have entered forces which have been our allies, like the Flying Tigers, where our allies paved the way, their American citizenship should be protected to the same extent as if subsequently they were told

"they could join the British forces with no loss by so doing. [sic]

Representative Walter. Mr. Miller, only yesterday, suggested a solution by exempting from this section the men who served with forces which subsequently became our allies.

Mr. Butler. That would be a step in the right direction. I am still fearful of requiring written permission prior to entry in the conjunctive.

Many of those youngsters who did not stop to get permission from anybody felt they were justified in doing it, and since then we have said they were, and they have served this country ably.

Representative Chelf: You are talking about friendly countries.

Mr. Butler. Only friendly countries, because nobody would give sanction to any hostile country. That is why I say I feel it is a perfectly safe suggestion. ...'27

While he mentioned as a factual matter that the proposed draft eliminated the provision that loss of nationality would occur only if the individual had or acquired the nationality of the foreign state in whose armed forces he served, that change was permitted to pass without comment. Significantly, however, in his prepared statement which was submitted to the Joint Subcommittees, Mr. Butler remarked with respect to the proposed text of Section 349(a)(4), providing for loss of nationality by accepting, or performing the duties of, any office, post or employment under the government of a foreign state:

"The proposed section eliminates the words 'for which only nations of such state are eligible' and substitutes 'if he has or acquires the nationality of such foreign state'. The national council endorses this amendment insofar as it tends

"to decrease the incidence of statelessness."[28]

This failure to comment with respect to the creation of a potential for statelessness in the proposed legislation, constituting as it did a radical departure from the terms of Section 401(c) of the 1940 Act, can only be regarded as inexplicable when contrasted with the endorsement (for the reason that it reduced statelessness) of the change to the immediately succeeding section which incorporated the precise language deleted from the section on foreign armed service. Prominent Government witnesses, such as Deputy Attorney General Peyton Ford,[29] Acting Commissioner Argyle R. Mackey of the Immigration and Naturalization Service[30] and L. Paul Winings, General Counsel of the Immigration and Naturalization Service,[31] who testified before the Joint Subcommittees, did not mention the proposed Section 349 in their statements. Nevertheless, significant criticism was leveled at the loss of nationality provisions in general during the Hearings in the statement of Gustav Lazarus, President of the Association of Immigration and Nationality Lawyers.[32] Mr. Lazarus, however, did not specifically analyze Section 349(a)(3).

3. Legislative Purpose

With such a paucity of information concerning the Congressional intent behind the enacting of Section 349(a)(3), it is virtually impossible to determine what Congress sought

to accomplish by the provision, or whether they appreciated the significance of the change in the prior law. Service in an armed force by an alien without loss of prior nationality, or the acquisition of a new or additional nationality, was certainly not unknown to the Congress. United States selective service laws make male aliens admitted for permanent residence subject to draft in the U.S. military service.[33] In addition, such service is not deemed to confer United States citizenship on the individual alien.[34] It could not have been thought that a United States citizen who served in a foreign armed force would necessarily acquire the nationality of that country. It would appear, rather, that Congress enacted Section 349(a)(3) without consideration of its possible impact upon the individual through the creation of the potential for statelessness.

Such attention as was focused on the measure was concerned with the position of those who served in the armed forces of a nation which later became allied with the United States in hostilities. No consideration was given to the fate of citizens who served in the armed forces of a country engaged in conflicts toward which the United States sought to preserve a neutral stance -- or indeed, that the United States might ever seek to be neutral. The foreign armed forces under discussion during the Hearings were either enemies or allies. Nevertheless, since Section 349(a)(3) is of general applicability,

it may be concluded that Congress did not intend to make its proscription depend upon the political relationship between the United States and the foreign government in question -- allied, neutral or enemy. As will be discussed infra, Section 349(a)(3) does fill a hiatus in the United States Neutrality Laws; that it was intended to do so, however, cannot even be speculated.

The proposal that authorization be permitted either before or after service in the foreign armed force, as suggested by Mr. Butler, would certainly have put a premium upon a United States citizen's attempt to second-guess the future foreign policy of his government, if he was concerned with preserving his nationality. The failure to incorporate this proposal in Section 349(a)(3) does indicate a Congressional intent not to countenance such activity.

B. The Decision in Afroyim v. Rusk

1. The Majority Opinion

In the case of Afroyim v. Rusk, supra, the petitioner, Afroyim, who had been born in Poland, immigrated to the United States and became a naturalized citizen in 1926. In 1950, he went to Israel, and in 1951 he voluntarily voted in a political election for the legislative body of Israel, the Knesset. When he applied for a renewal of his United States passport in 1960, the Department of State refused to grant the renewal on the

ground that he had lost his citizenship by virtue of Section 401(e) of the Nationality Act of 1940, citing his participation in the 1951 Knesset election.[35] Afroyim thereupon brought suit for a declaratory judgment of citizenship, relying not upon the obligations of any dual Israeli-United States nationality,[36] but alleging that Section 401(e) violated both the Due Process Clause of the Fifth Amendment and Section 1, clause 1 of the Fourteenth Amendment. The petitioner argued that, since neither the Fourteenth Amendment nor any other provision of the Constitution expressly granted Congress the power to deprive a person of his citizenship once it had been acquired, the only way he could lose his citizenship was "by his own voluntary renunciation of it."[37] This argument was rejected by the District Court and the Court of Appeals, which upheld the constitutionality of the statute on the basis of Congress' implied power to regulate foreign affairs. With regard to these prior decisions the Supreme Court stated:

> "Consequently, petitioner was held to have lost his American citizenship regardless of his intention not to give it up. This is precisely what this Court held in Perez v. Brownell, 356 U.S. 44, 78 S. Ct. 568, 2 L.Ed.2d 603."[38]

After discussing the background and rationale of the Perez case, supra, Mr. Justice Black, speaking for the majority of the Court in a 5 to 4 decision, stated:

> 'First we reject the idea expressed in Perez that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as Perez indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. And even before the adoption of the Fourteenth Amendment, views were expressed in Congress, and by this Court that under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship.'39

In support of its decision, the Court detailed various proposals for defining conduct which would result in expatriation which Congress, from its earliest days in the late eighteenth century to 1868, had considered and rejected. In discussing the passage of the Fourteenth Amendment, the Court assented to the proposition that the primary purpose served in its enactment was to give permanence and security to the citizenship of Negroes, who, at that time, had recently been

granted citizenship by the Civil Rights Act of 1866. The Court thereupon held that this primary purpose would be thwarted, "by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted."[40]

Basing its holding in the case on the language and purpose of the Fourteenth Amendment, the Court concluded:

> "Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world - as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.
>
> Perez v. Brownell is overruled. The judgment is reversed."[41]

2. The Dissenting Opinion

In dissent from the majority opinion in Afroyim, Mr. Justice Harlan, speaking also for Justices Clark, Stewart and White, adhered to the reasoning of Perez v. Brownell.[42] In that case the Supreme Court upheld as constitutional the same provision of the Nationality Act of 1940 with which Afroyim was concerned. There the Court held that the Congress derived, from its implied power to regulate foreign affairs, the authority to expatriate citizens who voluntarily perform acts which may be prejudicial to the foreign relations of the United States, and which may reasonably be considered to be a dilution of allegiance to the United States. Such authority was construed as a "necessary and proper" means of exercising that implied power, and Congress could appropriately consider voluntary voting in a foreign political election to be an act within the scope of that authority.

The dissenters attacked as "conclusory" and "quite unsubstantial"[43] the majority's assertion that the Congress was without power, express or implied, to expatriate a citizen "without his assent".[44] In addition, in connection with the term "assent", Mr. Justice Harlan pointed out an inherent ambiguity in the majority opinion. At one point Mr. Justice Black, writing for the majority stated, "we agree with the Chief Justice's dissent in the Perez case that the

Government is without power to rob a citizen of his citizenship under §401(e)."[45] However, in his Perez dissent, The Chief Justice also stated that:

> "It has long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country. While the essential qualities of the citizen-state relationship under our Constitution preclude the exercise of governmental power to divest United States citizenship, the establishment of that relationship did not impair the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship. Nor is this the only act by which the citizen may show a voluntary abandonment of citizenship. Any action by which he manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status. In recognizing the consequence of such action, the Government is not taking away United States citizenship to implement its general regulatory powers, for, as previously indicated, in my judgment citizenship is immune from divestment under these powers. Rather, the Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship."[46]

The Chief Justice nevertheless pursued his dissenting argument by asserting that the fact of voting in a foreign political election was insufficient "to show a voluntary abandonment of citizenship."[47] Such an acknowledgment (that "actions in derogation of undivided allegiance" can result in expatriation) would certainly imply acceptance and, therefore, approbation of a loss of citizenship without the citizen's assent. Yet

the majority opinion in Afroyim, taken as a whole, could hardly be construed as supporting such a power on the part of Congress.

Further ambiguity was revealed in the majority's use of the word "voluntary". An example may be seen in the statement, "Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."[48] Read in terms of the phrase "without his assent", the word "voluntarily" can only mean "intentionally". On the other hand, in conjunction with the approving reference to the Chief Justice's dissent in Perez, "voluntary" can be construed as describing the uncoerced commission of an act which is presumed by law to be expatriative because of its derogation of undivided allegiance. As observed by Mr. Justice Harlan:

> "Whatever the Court's position, it has assumed that voluntariness is here a term of fixed meaning: in fact, of course, it has been employed to describe both a specific intent to renounce citizenship, and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship. Until the Court indicates with greater precision what it means by 'assent', today's opinion will surely cause still greater confusion in this area of the law."[49]

The dissent further challenged the historical basis of the evidence which the majority opinion had marshalled in

support of, and as compelling, its decision. In connection with statements made in Congress prior to the passage of the Fourteenth Amendment, which would indicate a belief that Congress was without power to expatriate unwilling citizens, it was observed that such comments by no means represented a consensus on the issue and that they are deductions largely based on constitutional premises which have since been abandoned. These premises stemmed from the Jeffersonian contention that a person's citizenship was derived primarily from his State, and only from the Federal Government through his State. Since Congress could not control allegiance to the State government, a man perforce remained a citizen of the United States while he was a citizen of a State. Under this view, Congress would indeed possess no power to expatriate an unwilling citizen; however, the doctrine itself did not survive. In addition, contemporaneous with the passage of the Fourteenth Amendment, Congress adopted measures which in fact reveal that they considered themselves as vested with the power to expatriate unwilling citizens.

In response to the assertion by the majority that the Fourteenth Amendment establishes Congress' inability to expatriate a citizen without his consent, the dissent reveals that the clause defining citizenship was included in the Amendment only to declare unreservedly that the recently freed Negroes were citizens, and thus avoid the reasoning of

the Dred Scott decision.[50] Further, the Citizenship Clause would unequivocably lay to rest the doctrine of primary State citizenship, and would prevent any attempt to deny Negroes the right of citizenship by denying them State citizenship. "Nothing in the /Congressional/ debates, however, supports the Court's assertion that the clause was intended to deny Congress its authority to expatriate unwilling citizens."[51]

With regard to dicta relied upon by the majority from the cases of Osborn v. Bank of the United States[52] and the United States v. Wong Kim Ark[53] the dissent reveals that they are wholly inapposite to the issue before the Court in Afroyim. In Osborn, Chief Justice Marshall stated:

> "/The naturalized citizen/ becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[54]

In quoting from Wong Kim Ark the majority stated:

> "The issues in that case were whether a person born in the United States to Chinese aliens was a citizen of the United States and whether, nevertheless, he could be excluded under the Chinese Exclusion Act, 22 Stat. 58. The Court first held that within the terms of the Fourteenth Amendment, Wong Kim Ark was a citizen of the United States, and then pointed out that though he might 'renounce

'The construction demanded by the pertinent historical evidence, and entirely consistent with the clause's terms and purposes, is instead that it declares to whom citizenship, as a consequence either of birth or of naturalization, initially attaches. The clause thus served at the time of its passage both to overturn Dred Scott and to provide a foundation for federal citizenship entirely independent of state citizenship. In this fashion it effectively guaranteed that the Amendment's protection would not subsequently be withheld from those for whom it was principally intended. But nothing in the history, purposes, or language of the clause suggests that it forbids Congress in all circumstances to withdraw the citizenship of an unwilling citizen. To the contrary, it was expected, and should now be understood, to leave Congress at liberty to expatriate a citizen if the expatriation is an approprate /sic/ exercise of a power otherwise given to Congress by the Constitution, and if the methods and terms of expatriation adopted by Congress are consistent with the Constitution's other relevant commands.

The Citizenship Clause thus neither denies nor provides to Congress any power of expatriation; its consequences are, for present purposes, exhausted by its declaration of the classes of individuals to whom citizenship initially attaches. Once obtained, citizenship is of course protected from arbitrary withdrawal by the constraints placed around Congress' powers by the Constitution; it is not proper to create from the Citizenship Clause an additional, and entirely unwarranted, restriction upon legislative authority. The construction now placed on the Citizenship Clause rests, in the last analysis, simply on the Court's ipse dixit, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power.

I believe that Perez was rightly decided, and on its authority would affirm the judgment of the Court of Appeals."57

C. Summary of Case Law prior to Afroim v. Rusk

As previously mentioned, the Supreme Court held in the case of Perez v. Brownell, supra, that Congress was constitutionally empowered to legislate the expatriation of citizens who, uncoerced, perform acts which may reasonably be considered a diminution of their allegiance to the United States and which may be prejudicial to the conduct of foreign affairs. Such power was held to derive from Congress' implied, yet inherent, authority to regulate the nation's foreign relations; expatriation was considered to be within the "ample scope" of the necessary and proper means of effectuating this authority.

The majority of the Court in Perez recognized that the power to regulate foreign affairs did not give to Congress a carte blanche to legislate expatriation. Mr. Justice Frankfurter stated, "Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution."[58] In reasoning that a rational nexus existed between voting in a foreign political election and Congress' power over foreign affairs, the Court opined that a citizen's action may, even "unwittingly", promote a course of conduct inimical to the interests of his own government. In addition, his actions may be regarded by the people or government of a foreign country to be the actions of his government

or an expression of its policy.

> "The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."[59]

Of course, as the Perez majority acknowledged, the conduct which results in expatriation must be engaged in voluntarily. This did not mean, however, that to lose citizenship the person "must intend or desire to do so."[60] In support of its position the Court cited the cases of Mackensie v. Hare,[61] and Savorgnan v. United States,[62] wherein the plaintiffs, both of whom were women, were held to have lost their citizenship through marriage to a British subject, and marriage to an Italian subject and subsequent application for Italian citizenship, respectively. The Court stated:

> "Those two cases mean nothing -- indeed, they are deceptive -- if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent. It is a distortion of those cases to explain them away on a theory that a citizen's assent to

> 'denationalization may be inferred from his having engaged in conduct that amounts to an 'abandonment of citizenship' or a 'transfer of allegiance.''63

The recognition of a requirement for a "rational nexus" between the power to regulate foreign affairs and the conduct sought to be regulated would seem to belie the fear, expressed by Mr. Justice Douglas in a separate dissenting opinion filed in Perez, that acceptance of Congressional power to expatriate for certain activities embarrassing to foreign affairs could result in its being infinitely extended to reach any conduct disfavored by government, even political dissent. This separate dissenting opinion, with Mr. Justice Black concurring, foreshadowed the position eventually adopted by a majority of the Supreme Court in Afroyim, that expatriation can only result with the individual citizen's assent -- he must unequivocably express his intention to shed his United States citizenship.

In support of his opinion in dissent, Justice Douglas stated:

> "Our landmark decision on expatriation is Perkins v. Elg, 307 U.S. 325, where Chief Justice Hughes wrote for the Court. The emphasis of that opinion is that 'Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.' Id., at 334.
>
> "Today's decision breaks with that tradition. It allows Congress to brand

> "an ambiguous act as a 'voluntary renunciation' of citizenship when there is no requirement and no finding that the citizen transferred his loyalty from this country to another."[64]

In Perkins v. Elg,[65] however, the issue presented for decision concerned the right of election of a minor of dual nationality. There, the petitioner, Marie Elizabeth Elg, had been born in the United States of Swedish parents naturalized in the United States. During her minority she was taken to Sweden by her parents who resumed their Swedish citizenship. Upon reaching the age of majority, she returned to the United States with the intent to remain and to maintain her United States citizenship. The question was whether or not she had lost her United States citizenship, so that she was subject to deportation, by virtue of the Naturalization Convention and Protocol of 1869 between the United States and Sweden and her parents' resumption of their Swedish citizenship. The Court held that upon her birth in the United States the petitioner became a United States citizen:

> "...[T]hat citizenship must be deemed to continue unless she had been deprived of it through the operation of a treaty of congressional enactment or by voluntary action in conformity with applicable legal principles."[66]
> (emphasis supplied)

In holding that her right of election was preserved, and that she had effectively exercised it in favor of United States citizenship, the Court stated:

> "To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice. (emphasis supplied) **** Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking."

Not only does the Ellis case, which was relied upon by Justice Douglas, not deal with the issues before the Court in Perez, but the actual language there employed by Chief Justice Hughes intimates some support for the Perez majority position. Nowhere does the case state that Congress cannot provide that certain conduct voluntarily engaged in by a citizen will result in expatriation, and that, even without an expression of intent on the part of the individual, such uncoerced conduct may be considered as a "voluntary renunciation or abandonment of nationality and allegiance."

Subsequent to the decision in Perez v. Brownell, supra, and prior to Afroyim v. Rusk, supra, the Supreme Court ruled on the constitutionality of various provisions of Section 349 (a) of the Immigration and Nationality Act of 1952 (formerly Section 401 of the Nationality Act of 1940). On the same day the Perez decision was handed down, the Court announced the

decision in Trop v. Dulles,[68] which invalidated Section 349(a)(8) of the Act,[69] providing for loss of citizenship as a result of conviction by court-martial for desertion from the armed forces in war time, and consequent dismissal or dishonorable discharge from the armed services.

The Trop case, like Perez, was decided by a delicate 5 to 4 majority. Mr. Chief Justice Warren, delivering the plurality opinion of the Court and speaking for Justices Black, Douglas and Whittaker, who had joined him in dissent in Perez, declared that Congress had no power to expatriate, but that even if it did, the statutory provision was invalid. He found that the object of the statute was to impose an additional punishment for desertion in time of war, and that it resulted in statelessness for the individual convicted. This loss of status in the eyes of the world community was held to be a cruel and unusual punishment constitutionally prohibited by the Eighth Amendment. The majority in the case was determined by the opinion of Mr. Justice Brennan, who adhered to his belief expressed in Perez that Congress does have the power to expatriate, but who declared that in this instance there was no rational connection between the statute and the war powers of Congress. Through his concurrence in the invalidation of the statute, Justice Brennan swung the balance in composing the majority. Justices Frankfurter, Burton, Harlan and Clark, who along with Brennan had composed the

majority in Perez, dissented in Trop. They adhered to the view that Congress does possess the power of expatriation, and found no violation of the Eighth Amendment or lack of rational nexus between the statute and Congressional war powers.

A third decision rendered on the same day as Perez and Trop was Nishikawa v. Dulles,[70] which concerned loss of citizenship through service in foreign armed forces under Section 401(c) of the Nationality Act of 1940.[71] There, the majority of the Court led by Mr. Chief Justice Warren, did not reach the constitutionality of the statute, ruling instead that the government had the burden of proving the voluntariness of service in the foreign armed force by "clear, convincing and unequivocal evidence" once the issue of duress had been injected into the case by the citizenship-claimant. The court ruled that the government had not sustained its burden in this case, stating:

> "Unless voluntariness is put in issue, the Government makes its case simply by proving the objective expatriating act. But here petitioner showed he was conscripted in a totalitarian country to whose conscription law, with its penal sanctions he was subject. This adequately injected the issue of voluntariness and required the Government to sustain its burden of proving voluntary conduct by clear, convincing and unequivocal evidence. The Government has not sustained that burden on this record. The fact that petitioner made no protest and did not seek aid of

> merican officials -- efforts that, for all that appears, would have been in vain -- does not satisfy the requisite standard of proof. .... The Government's only affirmative evidence was that petitioner went to Japan at a time when he was subject to conscription."[72]

A concurring opinion of Mr. Justice Black, joined in by Mr. Justice Douglas, expounded their belief once again that Congress had no power to expatriate. He opined:

> "Although Congress can enact laws punishing those who shirk their duties as citizens or those who jeopardize our relations with foreign countries it cannot involuntarily expatriate any citizen."[73]

In composing part of the majority of this 7 to 2 decision, Justices Frankfurter and Burton declared that normally, an individual should have the burden of proving his state of mind, since he "is peculiarly equipped to clarify an ambiguity in the meaning of outward events."[74] They felt, however, that where conduct is performed by command of a penal law of a country to which he is subject, the government should be charged with proof that the citizen's conduct was not in response to that command, but was the result of his own direction.

In dissent in Nishikawa, Justices Harlan and Clark expressed the belief that the majority had imposed a "well-nigh impossible task" upon the government in requiring it to prove that the expatriating conduct was voluntary by "clear,

convincing and unequivocal evidence". Since the operative facts were peculiarly within the possession of the citizenship-claimant, they felt that he should be required to show involuntariness. The dissenting Justices also felt that the issue of constitutionality was foreclosed by Perez, and disagreed with the emphasis placed by the majority upon conscription:

> "To permit conscription without more to establish duress unjustifiably limits, if it does not largely nullify, the mandate of §401(c). By exempting from the reach of the statute all those serving in foreign armies as to whom no more has been shown than their conscription, the Court is attributing to Congress the intention to permit many Americans who served in such armies to do so with impunity. There is no solid basis for such a restrictive interpretation. By the time the Nationality Act of 1940 was passed, conscription and not voluntary enlistment had become the usual method of raising armies throughout the world, and it can hardly be doubted that Congress was aware of this fact. In view of this background it is farfetched to assume that Congress intended the result reached by the Court, a result plainly inconsistent with the even-handed administration of §401(c). Moreover, the very terms of the section, which refer to both 'entering' and 'serving in' foreign armed forces, are at odds with such an intention."[75]

Five years after the decisions in Perez, Trop and Nishikawa, the Supreme Court again dealt with the expatriation statutes in Kennedy v. Mendoza-Martinez.[76] This case involved Section 349(a)(10) of the 1952 Act,[77] prescribing expatriation for departing or remaining outside the jurisdiction of the

United States in wartime or in time of national emergency for the purposes of evading or avoiding military training and service. Failure to comply with any of the compulsory service laws was statutorally declared to raise the presumption that departure or absence from the United States was for the purpose of evading or avoiding military training and service. In another 5 to 4 decision, Mr. Justice Goldberg, speaking for the Court, held that the provision was plainly intended to be punitive and, as such, was unconstitutional since it failed to provide for the procedural safeguards of due process guaranteed by the Fifth and Sixth Amendments. In a concurring opinion, Justices Douglas and Black reiterated their view that Congress has no power to deprive a person of his citizenship.

Dissenting in Mendoza-Martinez, Mr. Justice Stewart, with Mr. Justice White concurring, argued that loss of citizenship was not punishment in the constitutional sense, but did find invalid the provision of the statute governing the raising of a presumption of intent. In a separate dissent, Mr. Justice Harlan, joined by Mr. Justice Clark, found the statute constitutional.

The next case before the Supreme Court concerning the expatriation provisions of the Immigration and Nationality Act was that of Schneider v. Rusk,[78] decided in 1964. Schneider

involved Section 352(a) of the Act,[79] providing for loss of citizenship by a naturalized person having a continuous residence for three years in the territory of the country of his former nationality, or of the country of his place of birth. Mr. Justice Douglas, speaking for a majority of five Justices, held that the statute was constitutionally invalid since it created an impermissable distinction between native born and naturalized citizens, a discrimination which was violative of due process. Mr. Justice Brennan did not participate in the Schneider decision on the reported ground that his son had been involved in the case as counsel on the District Court level.[80]

On the same day as the Schneider case, an equally divided Supreme Court affirmed the decision of the Second Circuit Court of Appeals in U.S. ex rel. Marks v. Esperdy.[81] This case involved a native-born United States citizen who was held to have lost his citizenship by virtue of his service in the Cuban armed forces after the successful conclusion of the Castro revolution. As a result of its inability to obtain a majority view because of the abstention of Mr. Justice Brennan, the evenly divided Court upheld the validity of Section 349(a)(3) of the Act[82] providing for loss of United States citizenship for unauthorized service in the armed forces of a foreign state. In the opinion below, Circuit Judge Waterman stated:

> "Marks appeals ... claiming ... that §1481(a)(3) as here applied is unconstitutional in that it imposes a cruel and inhuman /sic/punishment in violation of the Eighth Amendment. Although we find great force in the constitutional arguments presented by relator's counsel, we are constrained by the superior authority of Perez v. Brownell, 356, U.S. 44, 78 S.Ct. 568, 2L.Ed. 2d 603 (1948) /sic/, to affirm the determination of alienage on the opinion of Judge Cashin, the district judge below, 203 F.Supp. 389 (1962)."[83]

The abstention of Mr. Justice Brennan in the Marks case is particularly significant. While Marks argued that his expatriation would result in cruel and unusual punishment (presumably because it would make him a stateless person) in violation of the Eighth Amendment, a position which was sustained in the plurality opinion in Trop v. Dulles, supra. it should be recalled that Mr. Justice Brennan swung the balance in that case by concurring on the ground that the statute in question lacked a rational nexus with Congress' war powers. Nonetheless, in Trop, he upheld the power of Congress to expatriate. In Kennedy v. Mendoza-Martinez, supra, Mr. Justice Brennan indicated in his concurring opinion that he had "some felt doubts of the correctness of Perez, which I joined."[84] He further indicated his belief that the Court had never acknowledged Congression power to expatriate "except where its exercise was intrinsically and peculiarly appropriate to the solution of serious problems inevitably implicating nationality."[85] Whether Justice Brennan would have joined a

majority in Marks upholding Congressional power to expatriate unwilling citizens on the basis of his prior statements is entirely speculative. In any event, he had apparently adopted the contrary view by the time of the decision in Afroyim v. Rusk, supra; there he joined in a five man majority comprised of Chief Justice Warren and Justices Black, Douglas and Fortas, in addition to himself. He did not file a separate opinion in the case.

With the Afroyim case, the adherents of what has been called "the absolute view"[86] have prevailed in the assult upon the power of Congress to expatriate an unwilling citizen. This view, consistently championed by Mr. Justices Black and Douglas, holds "that expatriation can result only from the conscious, deliberate action of the citizen in renouncing his citizenship."[87] Without doubt, this most recent enunciation of the law of expatriation by the Supreme Court stands for the proposition that a citizen may only be divested of his citizenship by an unequivocal, intentional act of renunciation on his part; Congress is without power to order the loss. The Citizen's intent is the key: without an expression of that intent to the contrary, citizenship becomes an indelible heritage."

> "It has come full circle from the common-law doctrine that allegiance is immutable unless the sovereign ends it, to a conclusion that citizenship is impregnable against any action by the state, unless the citizen wishes to sever the tie."[88]

Although specifically applicable only to the statutory provision prescribing expatriation for voting in a foreign political election, with its sweeping language Afroyim would, by implication, strike down all other statutory provisions calling for unwilling expatriation for specific acts. Decisive as this language may appear, however, its supporters may have only momentarily gained the day. The long and hard-fought debates over the Congressional power illustrate that the "absolute view" does not have universal acceptance in judicial opinion. Any change in the composition of the Supreme Court could foretell a different result. Significant for what future decisions may hold is the fact that of the five man majority in Afroyim, only three remain on the high bench.

III Effect of Afroyim v. Rusk on Loss of Nationality through Voluntary Entrance and Service in Foreign Armed Forces

A. Erosion of the Constitutional Basis of Section 349(a)(3) of the Immigration and Nationality Act of 1952

In Afroyim, the decision of the Supreme Court was confined to the resolution of the actual case and controversy before it. Beyond that they could not go.[89] Although the majority opinion of Mr. Justice Black did not specifically state that Section 401(e) of the 1940 Act[90] was unconstitutional, the opinion did state, "Perez v. Brownell is overruled."[91] Perez had ruled that Section 401(e) was constitutional. While constitutional issues are normally resolved in specific language, the specific overruling of Perez does effectively declare the statutory provision to be unconstitutional. As the law now stands, that issue may be deemed resolved.

Travelling beyond the actual scope of Afroyim, however, a more difficult question is presented. That question is, "What is the effect of Afroyim on other subparagraphs of Section 349(a) which have not yet been ruled unconstitutional by the Supreme Court?" These statutory provisions putatively still stand as law. Nevertheless, the sweeping language of Afroyim v. Rusk, supra, clearly reveals the Supreme Court's negation of the power of Congress to prescribe grounds for expatriation; inasmuch as the Constitution has not specifically

conferred such a power upon Congress, this position holds that it is a power reserved to the people under the Tenth Amendment. By implication, then, all other provisions of the loss of nationality statute are struck down on the basis of a fundamental lack of power in Congress, saving only those provisions concerning expatriating acts which clearly reveal an intention to divest oneself of citizenship.

Such a defect certainly extends to Section 349(a)(3) of the 1952 Act, prescribing the loss of citizenship for unauthorized entrance and service in the armed forces of a foreign country. Considered in light of the Supreme Court's enunciation of the law in Afroyim, such a provision would patently appear to be constitutionally unenforceable. It is this interpretation which has so alienated the Arab nations from the United States in view of the service of some United States citizens in the armed forces of Israel. Yet, as will be discussed below, an act of Congress may not be held to be unconstitutional by implication. To strike down the expressed will of Congress by the extension of what purports to be a general principle (albeit it may indeed be a logical extension), fails to accord the legislative power adequate deference as a coordinate branch of government under the Constitution.

B. Attorney General's Opinion on the Effect of Afroyim v. Rusk

On 18 January 1969, Mr. Ramsey Clark, then Attorney General of the United States, issued an Attorney General's

Opinion concerning the effect of Afroyim on the validity of expatriation provisions, other than those relating to voting, in the Immigration and Nationality Act of 1952.[92] The opinion fails to indicate a complete appreciation of the Court's decision in Afroyim -- that Congress lacks the power to expatriate an unwilling citizen, and that citizenship may only be lost through an intentional relinquishment of it. It dwells, instead, on what acts may be held to constitute a "voluntary relinquishment" of citizenship; such "voluntary relinquishment" was defined as not limited to written renunciation, but could include acts in derogation of allegiance which are declared expatriative. As indicated above, the term "voluntary" has been susceptible of a twofold interpretation ("intentional" versus "uncoerced"), and its use does not contribute to clarity in this instance. While the Attorney General acknowledged that, "the ultimate determination of the effect of Afroyim is a matter for the courts,"[93] the opinion nevertheless purports to rule on the decision's effect for administrative purposes under the authority of Section 103(a) of the 1952 Act.[94] That section of the Immigration and Nationality Act provides that the Attorney General's ruling on all matters of law under the Act shall be controlling; it does not, however, grant the Attorney General power to pass on the constitutionality of statutory provisions on the basis of analogy from prior cases. The opinion stated:

> "Indeed, Afroyim does not reach the question of whether it may be possible

> 'under some circumstances for allegiance to be transferred or abandoned without constituting a voluntary relinquishment of the status of citizenship. That question must await further court decisions. 'Under any reading of Afroyim, however, it is clear that an act which does not reasonably manifest an individual's transfer or abandonment of allegiance to the 'nited States cannot be made a basis for expatriation."[57]

Enlistment in the armed forces of an "allied country" was characterized as "not necessarily" evidence of an intent to abandon United States citizenship. Thus, it remains open for administrative authorities to make a case by case determination as to whether an individual has "voluntarily relinquished" his citizenship, bearing in mind that voluntary relinquishment is not limited to written renunciation but may be manifested by actions deemed expatriative under the Act if they are in derogation of allegiance to the United States. It may be suggested that while this directive stops short of rendering an act of Congress totally nugatory through mere implication (e.g., Section 349(a)(3)), it fails to appreciate the full import of Afroyim, which was a denial of the Congressional power to legislate denationalization.

C. Department of State Position on the Effect of Afroyim v. Rusk

A position on the effect of Afroyim akin to that of the Attorney General was announced by the U.S. Department of State in a statement which was circulated as an official document in the United Nations by the Permanent Representative of

the United States on 20 October 1969.[96] This statement, while condemning Section 349(a)(3) by implication, does reveal a more precise appreciation of Afroyim:

> "Our laws concerning the circumstances under which Americans may lose their United States citizenship are interpreted by the courts as cases come before them. Each individual case must be considered and decided on its merits. This is especially true because recent decisions of the United States courts have held that United States citizenship is not automatically lost by performance of certain acts, such as serving in a foreign army. Loss depends largely on the intent of the individual."[97]

The statement was circulated in response to allegations made by the Permanent Representative of the United Arab Republic to the United Nations:

> "I have learned with great concern and astonishment of the official declarations made by the United States Embassy in Tel Aviv revealing that United States citizens could maintain their American nationality even if they become citizens of Israel and enlist in its armed forces. This means that American citizens can have double allegiance to Israel and the United States and that they can take part in military aggressive acts which Israel commits against the Arab countries.
>
> The United States, which has continued giving its political, economic and military aid to Israel following its aggression against the Arab countries on 5 June 1967, commences today a new phase in its assistance to Israel through the joining of American citizens in Israeli armed forces. Consequently, the United States is contributing to the aggressive war which is being launched by Israel against the Arab countries, a method which does not differ much from the method by which the United States began its war in Viet-Nam. This

'new development represents a phase which is fraught with great danger and which undermines the endeavours aiming at the realization of a peaceful settlement within the United Nations.

The United States, which pledged its support of Security Council resolution 242 (1967) of 22 November 1967, is engaging at present in undermining that resolution and endangering peace through providing Israel with arms and planes and encouraging American citizens to take arms under the Israeli flag against the Arab people."[20]

Countering this charge, the United States Permanent Representative stated in his circulated release:

"I want to make it perfectly clear that the speculation that the United States Government is somehow encouraging Americans to serve in any foreign armed forces is absolutely without foundation. ... Americans residing abroad in Europe, the Middle East and elsewhere may be subject to induction for military service depending on the laws of the particular country in which they are living. If they happen to have dual citizenship, other obligations may be involved. We ourselves draft resident aliens. An alien who serves in our armed forces does not automatically become a citizen: the act of becoming a citizen is a clearly separate act, and our view on the situation of Americans abroad reflects this same idea. The mere fact of military service in a foreign army, be it British, French, Jordanian, Israeli, Belgian, Mexican or anywhere else where friendly relations obtain does not necessarily mean loss of American citizenship.

I emphasize that Israel is no special case: the laws and interpretations on citizenship matters have general applicability and no country is accorded any special status in this respect.

****

Because of the automatic extension of Israeli nationality to Jews entering Israel with an immigrant visa (unless the

> "Immigrant positively renounces the grant of Israeli citizenship at time of entry), a class of dual American and Israeli nationals has grown up. In the past, most such persons, though liable to military service, were more or less automatically deferred by the Israeli Government. In the last few years, however, increasing numbers have received call-up notices and have been obliged to serve, despite letters of assistance from the Embassy and protests from the individuals concerned. We have no information on numbers."99

This rejection of the allegations and explanation was followed by a Department of State Press Release on 11 November 1969:

> "Questions have been raised in the past few weeks regarding the United States Government's policy with respect to service by private American citizens in foreign armed forces.
>
> ****
>
> The reason that, as a matter of policy, the Department of State opposes service in foreign military forces is that such service can raise serious problems for our Government in the conduct of its foreign relations. Service in foreign military forces risks involvement by United States citizens in hostilities with countries with which we are at peace.
>
> We recognize that each state has the authority to determine who shall be entitled to its citizenship as well as the power to determine who, within its territories, shall be subject to compulsory military service. However, the Department of State hopes that individual Americans will do all that is legally possible to avoid foreign military service with its attendant risks for the over-all national interest as well as their personal welfare.
>
> The Department of State is actively considering whether there are additional steps that might be taken to support more fully the policy objectives of our Government on this matter."100

These expressions of United States policy with regard to service in foreign armed forces by United States citizens, reveal a certain sense of frustration on the part of American officials in dealing with a most sensitive problem in foreign relations. While Section 349(a)(3) of the Act remains as statutory law, its foundation has been gravely impaired by Afroyim, and enforcement of it admittedly has the appearance of futility. This attitude is evidenced in the State Department releases which appear to concede that the statutory prohibition of foreign military service is unconstitutional and, therefore, unenforceable. In this respect the State Department goes beyond the position asserted by the Attorney General in his Opinion, which required a case by case determination of voluntary relinquishment of citizenship on the basis of acts in derogation of allegiance to the United States. To this extent, the positions of two spokesmen of the executive branch of government are inconsistent. While the State Department approach does not contribute to the allaying of Arab apprehensions concerning United States intentions vis a vis Israel, it does, nevertheless, represent what is perhaps a more accurate reading of what Afroyim actually held.

D Arab Misconceptions on the Basis of Afroyim v. Rusk

Coupled with the apparent unwillingness of the United States Government to enforce Section 349(a)(3) of the Immigration and Nationality Act, there is a profound misunderstanding

on the part of Arab governments of the reasons behind the decision in Afroyim v. Rusk. Contrary to Arab allegations that the case reversed prior United States law in order to permit American citizens to fight on the side of Israel, Afroyim was concerned solely with fundamental constitutional issues and was decided in an arena which would hold foreign policy considerations to be extraneous to the determination of such issues. Far from being intended as an encouragement for United States citizens to join Israeli armed forces, the case represents, instead, the current prevalence of one viewpoint in a long debate in the Supreme Court over the extent of Federal legislative power. With regard to the Immigration and Nationality Act, this debate began with the dissent of Justices Black and Douglas in Perez v. Brownell, supra. The peregrinations of this debate have been outlined above; it is possible to observe how the "absolute view" gained adherents among the Justices of the Supreme Court until it was able, finally, to command a bare majority in Afroyim.

Essentially at issue in the Afroyim case is the reach of the Federal legislative power. Under the United States Constitution the powers of the Federal Government are specifically delegated; those powers not delegated, nor prohibited to the States by the Constitution, are reserved to the States or to the people under the Tenth Amendment. It is true that the Constitution does not specifically grant to the Federal

Government the power to determine the grounds on which a citizen may be expatriated; yet it is equally true that certain powers are inherent in the Federal Government as the voice of a sovereign nation in the world community of sovereign nations. One of these inherent powers is, indeed, the power to regulate foreign relations. While the history of Constitutional development in the United States has been one of expansion of power in the Federal area, each step in this expansion has been accompanied by deliberation and debate -- some of it controversial. So it is in the case of Federal legislation of expatriation.

In determining an issue of constitutional law the Justices of the Supreme Court are called upon to interpret the language and purposes of that fundamental law in arriving at what they conceive to be its dictates. If, in the opinion of a majority of Justices, an act of Congress contravenes the principles of the Constitution, that act must be invalidated.

> 'The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such /adverse litigants/ parties in determinining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be

> "enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government."[101]

In declaring an act of Congress unconstitutional, it is not controlling upon the Supreme Court that the act in question was prompted by reasons of great merit or not. The foreign policy implications are extraneous to the issue when confronted with a constitutional prohibition of Federal power. When Federal power is found to be lacking in a certain area, the Necessary and Proper Clause perforce has no field within which it can operate in that area. It is this aspect of the decision in Afroyim v. Rusk which has been misconstrued by the Arab nations.

Certainly the opinions of individual Justices may differ markedly as to the mandates of the Constitution as applied to the reach of Federal legislative power. The contest over the Federal power to legislate expatriation so illustrates. In an area of law as open to interpretation as expatriation has proven to be, the comment of Mr. Justice Harlan, that the decision in Afroyim represents "little more ... than the present majority's own distaste for the expatriation power,"[102] strikes a note of particular validity. The divergences which occur, however, represent differing concepts of our fundamental law and the social compact upon which it is founded; they do not reflect a choice of differing foreign policy goals.

IV Public International Law and the Withdrawal of Nationality by a Unilateral Act of State

A. Customary International Law

Withdrawal of nationality by the unilateral act of a State, and resultant statelessness, is a well known occurrence in public international law. The right to deprive a person of its nationality is a right which inheres in a State by virtue of its sovereignty and exists virtually untrammelled. Expatriation in the sense of loss of citizenship existed in Roman law in connection with the penal measures of banishment and deportation; in the nineteenth century deprivation of nationality was most commonly associated with penal measures as a consequence of conviction for certain crimes.[103] At present, on a comparative basis it is possible to discern various grounds for denationalization and modes of effectuating it which are common to many systems of municipal law; there is, however, no uniform practice in this regard.

> "A number of grounds for denationalization have been created which are common to many systems, although one cannot speak of uniform legislation. Moreover, legislation varies from country to country as to whether loss of nationality results automatically, by operation of law, from a certain act or conduct (which may also consist of an omission, e.g., failure to register with a diplomatic or consular representative), or whether a decision by a judicial or administrative authority is required. Within different States the law

> "varies to the extent of providing for automatic loss of nationality on certain grounds (for instance, entry into foreign military service) and for deprivation by an individual act of State only on other grounds (such as disloyal conduct)."[104]

The existence of this power of unilateral withdrawal of nationality by a State naturally gives rise to the spectre of statelessness, which has particularly distasteful and serious consequences in cases of mass denationalization. Such a mass denationalization occurred following the Russian Bolshevik Revolution when Soviet legislation provided for the loss of nationality by nationals residing abroad who had opposed, or who were considered as opposed, to the new regime. Similar mass denationalization occurred as the result of the racial policies of Nazi Germany when German Jews residing abroad were deprived of their nationality by virtue of a 1941 ordinance. The decisions of municipal courts as to whether such foreign denationalizations will be given effect within their jurisdictions have been varied; in some instances a determinative criterion has been whether the forum state has recognized the expatriating state.[105]

In Great Britain and the United States, statelessness as a result of denationalization appears to be recognized. In the case of Stoeck v. Public Trustee, the British Chancery Division held that a former Prussian national, who had obtained discharge of his Prussian nationality, had resided in

England without obtaining naturalization, and who, after deportation in 1918, returned to Germany to reside, was not a German national whose property situated in Great Britain was subject to charge under the Order and Treaty of Peace following World War I. The Court, per Lord Russell, stated:

> "...upon consideration of the arguments addressed to me and the statutory enactments before referred to, I hold that the condition of a stateless person is not a condition unrecognized by the municipal law of this country. ... Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person *is* a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law; ..."[196]

In *U.S. ex rel. Schwarzkopf v. Uhl*[197] the relator, a former Austrian national living in the United States, was held not to have acquired German nationality by virtue of Germany's absorption of Austria inasmuch as he was a non-resident of Austria at the time and had never agreed to accept German nationality. As a stateless person, Schwarzkopf was not an enemy alien subject to internment under a United States statute. The

court stated that even if Schwarzkopf had obtained German citizenship by virtue of the annexation, he would have lost it by virtue of the 1941 law denationalizing Jews living abroad. The court opined further:

> "There is no public policy of this country to preclude an American court from recognising the power of Germany to disclaim Schwarzkopf as a German citizen."[108]

This statement by the Second Circuit U.S. Court of Appeals is in line with the dictum of a leading American case in the field of nationality and citizenship -- U.S. v. Wong Kim Ark:[109]

> "Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship."[110]

Primarily motivated by a desire to avoid the incidence of statelessness, various writers have attempted to establish the existence of rules of international law restricting the right of States to withdraw nationality unilaterally. The evidence of State practice and judicial decisions as to the existence of such rules is to the contrary, however.[111]

> "It is submitted that the views of those who have tried to establish as a mandatory rule of existing law what must certainly be regarded as a sound and desirable rule for the future, find no justification in the present state of international law.

> "Neither the view that denationalisation is inconsistent with international law because it creates statelessness nor the view that it encroaches upon the rights of the individual finds support in the rules of international law. Statelessness is not inadmissible under international law--although it may be considered undesirable. The long-established doctrine that individuals have no rights under the existing law of nations is subject to challenge today, but it can hardly be maintained that there are any rights attributed to individuals by present international law which are infringed by denationalisation as such. The objections raised against loss of nationality by unilateral act of the State only, or even only against denationalisation on specific grounds, are inconsistent also because, for the purpose of judging the admissibility of denationalisation under international law, the methods and grounds of loss of nationality according to municipal law are immaterial."[112]

B. International Action Respecting Statelessness

Over the years numerous attempts have been made to create international law governing loss of nationality through the conclusion of bilateral treaties and multilateral conventions on the subject. Of great importance in this regard is the work of the Hague Conference for the Codification of International Law of 1930. Although the Committee on Nationality was unable to formulate any generally recognized principles upon which nationality might be obtained or lost,[113] the Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws,[114] and three Protocols thereto,[115] which were adopted at the Conference, generally reflect an

effort to eliminate or reduce the occurrence of statelessness. Articles 1 and 2 of the Convention, nevertheless, concede the traditional right of a State to determine its own nationals.[116] While upholding this traditional right, the Conference was nonetheless aware of the difficulties which unilateral State action with regard to nationality questions could create, and, in the Final Act of the Hague Conference, Sections I-VIII (13 March-12 April 1930), the following recommendation was made:

I.

> "The Conference is unanimously of the opinion that it is very desirable That States should, in the exercise of their power of regulating questions of nationality, make every effort to reduce so far as possible cases of statelessness,
> And that the League of Nations should continue the work which it has already undertaken for the purpose of arriving at an international settlement of this important matter."[117]

No action was taken pursuant to this recommendation by the League of Nations. However, contemporaneous with the drafting of the Universal Declaration of Human Rights, in 1947 the United Nations Commission on Human Rights adopted a Resolution on Stateless Persons in which it urged that the United Nations make recommendations to Member States concerning the conclusion of conventions on nationality, and that the United Nations itself give consideration to the legal status

of stateless persons, particularly their legal and social protection and their documentation.[118] Following this resolution of the Human Rights Commission, the United Nations Economic and Social Council requested the Secretary-General to undertake a study of statelessness, and, upon receipt of that report,[119] appointed an Ad Hoc Committee to prepare a draft resolution on the subject. Accordingly, on 11 August 1950, the Economic and Social Council adopted resolution 319 BIII(XI), entitled Resolution on Provisions Relating to the Problem of Statelessness, which, among other recommendations, invited States:

> "...to examine sympathetically applications for naturalization submitted by stateless persons habitually resident in their territory and, if necessary, to re-examine their nationality laws with a view to reducing as far as possible the number of cases of statelessness created by the operation of such laws;..."

Resolution 319 BIII(XI) further requested the International Law Commission to undertake the preparation of a "draft international convention or conventions for the elimination of statelessness;" this request was conveyed to the Commission during its third session in 1951. The International Law Commission had previously selected the topic of "nationality, including statelessness" as a subject for codification at its first session in 1949, but no special priority had been given the project. At its fourth session, in 1952, the Commission

discussed a working paper on statelessness which had been prepared by the Special Rapporteur on the topic, Manley O. Hudson. Following this discussion the Commission requested the newly appointed Special Rapporteur, Roberto Cordova, to prepare draft conventions on the reduction and on the elimination of future statelessness for consideration at its fifth session. Two draft conventions, one on the elimination of future statelessness, and another on the reduction of future statelessness, were adopted by the Commission at the fifth session in 1953, and were transmitted to Governments for comment.[120]

Fifteen Governments submitted their comments; on the whole, most of these States favored adoption of the principles expressed in the "reduction convention" rather than the "elimination convention", inasmuch as the former appeared most consistent with their domestic nationality legislation. In particular, there was objection to the limitation or denial of a State's right to deprive an individual of its nationality through unilateral action if the individual would thereby be rendered stateless. As stated in the reply from the Permanent Delegation of Australia to the United Nations: "It would appear to be out of the question that a person should be able to escape deprivation solely because he had no other nationality in addition to Australian citizenship."[121] The Canadian Government states, in a Note from the Secretary of State

for External Affairs dated 1 June 1954: "It is not thought that statelessness should be avoided at all costs and the Canadian Government would be reluctant to abandon its right to deprive disloyal, naturalized citizens of their Canadian nationality by way of penalty."[122] The opinion of the Egyptian Government was set forth in a Note from its Permanent Delegation to the United Nations:

> "The Egyptian Government does not approve of any limitation to be imposed upon its right of deprivation of nationality as a punishment because it considers the State the most competent authority to decide on acts which threaten its internal security or its economic and social structure."[123]

The Netherlands Government took exception to what they interpreted as an "unintended restriction" on the article curtailing or denying a State's right to deprive a person of its nationality, but they did not concur that the right to deprive of nationality, even with resulting statelessness, should be disallowed in all cases:

> "As regards this article /Article 7, eventually Article 8 in final draft/, the Netherlands Government likewise prefer the second draft /the reduction convention/ as the stringent provision that States are not allowed to deprive their nationals of their nationality by way of penalty, if such deprivation renders them stateless, is qualified by providing that an exception can be made in case such nationals voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State. Further the

> "Netherlands Government hold the view that the expression -- "by way of penalty" implies an unintended restriction of the article; therefore the Government would suggest to delete these words. This also applies to the second draft, as in many countries -- and certainly in the Netherlands -- deprivation of nationality on the ground of entering or continuing in the service of a foreign State is not considered a punitive measure but rather the logical result of the fact that the person concerned as [sic] evinced a degree of loyalty to a foreign State which is incompatible with his original nationality."[124]

In a Note from the United States Mission to the United Nations, dated 20 April 1954, the United States Government expressed its doubts as to the desirability of dealing with the subject of statelessness by international convention. This attitude was expressed as follows:

> "This Government realizes the hardships resulting to many people from statelessness and the importance for Governments to amend their laws to eliminate or reduce as far as possible the amount of statelessness which results from the operation of such laws. However, there is a question whether such elimination or reduction can best be accomplished through the medium of an international convention, concluded within the framework of the United Nations or through appropriate legislative action of individual Governments taken pursuant to a recommendation of some organ of the United Nations."[125]

With respect to the draft Article 7, which would negate a State's right to deprive of nationality "by way of penalty",

the United States Note continued:

> "This article, as it appears in either convention, is inconsistent with United States laws, which in several instances provide for deprivation of nationality "by way of penalty", regardless of whether such deprivation renders the individual stateless. As examples, there may be cited treason, desertion and draft evasion. With regard to the second paragraph of article 7 in the draft Convention on the Reduction of Future Statelessness, there is nothing in United States law which requires a judicial pronouncement before nationality is lost, although procedures have been established whereby persons who have been held administratively to have lost nationality may have the administrative determination reviewed by the courts."[126]

By citing only "treason, desertion and draft evasion" as examples of grounds giving rise to deprivation of nationality by way of penalty, the United States leaves unspecified the status of the seven other grounds for loss of nationality under Section 349(a) of the Immigration and Nationality Act of 1952.[127] It may indeed be said that these seven grounds, among them unauthorized service in a foreign armed force[128] and voting in a foreign political election,[129] do not constitute deprivation of nationality as a penalty, but, rather, simply ascribe certain consequences logically following upon certain acts, committed without coercion by a citizen, which indicate less than a complete allegiance to the United States. (A distinguishing factor between the three stated grounds and the remaining seven is that treason, desertion and draft

evasion are all offenses proscribed and punished under other statutory provisions -- and the imposition of loss of nationality constitutes an additional "punishment" for the offense. The remaining seven grounds under Section 349(a) do not give rise or relate to any criminal conduct.) Therefore, those seven grounds for loss of nationality which can be construed as not constituting a penalty would fall outside the limitation imposed on a State's authority to expatriate by Article 7 of the draft convention. Under such an interpretation, the United States would retain its power to expatriate an unwilling national by unilateral action. It was just such a "loophole" which the Netherlands Government sought to avoid by its proposal to delete the words "by way of penalty".

At its sixth session in 1954 the International Law Commission discussed the observations of Governments and redrafted some of the articles of both the elimination and the reduction conventions on the basis of their comments. In keeping with its essential purpose, the proposed draft for the Convention on the Elimination of Future Statelessness forbade the deprivation of nationality by a State, "by way of penalty or on any other ground", whenever such action would result in an individual becoming stateless.

The draft Convention on the Reduction of Future

statelessness permitted a State to deprive a naturalized person of his nationality because of residence in his country of origin for a period specified by the law of the naturalizing State, and also permitted the denationalization of any nationals who voluntarily entered or continued "in the service of a foreign country in disregard of an express prohibition of their State." Deprivation of nationality "by way of penalty or on any other ground" was prohibited when statelessness would result except in the two specified instances.[130]

Since some States had indicated their preference for the reduction convention while others had expressed no preference, the Commission decided to submit both draft conventions to the General Assembly in order that that body could determine whether preference should be given to one or the other. The drafts were discussed in the General Assembly's Sixth (Legal) Committee during the 1954 Session. The Committee determined that "the time was not ripe" to discuss the substance of the conventions, and that the positions of Member States on the matter were not sufficiently ascertained. On the basis of the Sixth Committee's Report, the General Assembly, by Resolution 896 (IX) of 4 December 1954, expressed a desire for the convening of an international conference for the purpose of concluding a convention on either the reduction or the elimination of future statelessness as soon as twenty States communicated

to the Secretary-General their willingness to co-operate in such a conference.[131]

After the lapse of almost five years, the United Nations Conference on the Elimination or Reduction of Future Statelessness convened at Geneva from 24 March to 18 April 1959 with thirty five States participating. The Conference adopted the International Law Commission's draft Convention on the Reduction of Future Statelessness as the basis for its discussions and formulated provisions for the reduction of statelessness at birth. There was no agreement, however, as to the limitation on the freedom of States to deprive individuals of their nationality in cases where to do so would render them stateless. Accordingly, the Conference reconvened in New York from 15 to 28 August 1961, with the participation of thirty States, and adopted a Convention on the Reduction of Statelessness. The Convention was opened for signature from 30 August 1961 to 31 May 1962, and will enter force two years after the date of the deposit of the sixth instrument of ratification or accession with the Secretary-General.[132] The Convention has not yet come into force.[133] Article 9 of the Convention prohibits in broad terms the deprivation of nationality on "racial, ethnic, religious or political grounds"; however, it is Article 8 which deals essentially with the right of a State to deprive a person of its nationality. Such a right is retained by a State on greatly narrowed grounds:

Article 8

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.
2. Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State:
   (a) in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality;
   (b) where the nationality has been obtained by misrepresentation or fraud.
3. Notwithstanding the provision of paragraph 1 of this Article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:
   (a) that, inconsistently with his duty of loyalty to the Contracting State, the person
      (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
      (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;
   (b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.
4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this Article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body."[13]

When, and if, the Convention on the Reduction of Statelessness does enter into force, its provisions will represent

a distinct limitation in the freedom of unilateral action by State Parties with regard to questions of withdrawal of nationality. As mentioned heretofore, customary international law imposes no effective limitations on the freedom of action of States in matters affecting withdrawal of their nationality. However, even if the United States should ratify the proposed Convention, certainly Section 349(a)(3) of the Immigration and Nationality Act, forbidding unauthorized service in foreign armed forces, would fall within the exception provided in Article 8, paragraph 3(a)(i).

V The Universal Declaration of Human Rights and the Right to a Nationality

A. Historical Development

Article 15 of the Universal Declaration of Human Rights enunciates a right to a nationality:

> "1. Everyone has the right to a nationality.
> 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[135]

This Declaration, adopted by resolution of the United Nations General Assembly on 10 December 1948, stands forth as a pronouncement of basic human rights and freedoms which serves as a standard of achievement for all nations.[136] While not a binding international agreement or a codification of existing international law, the Universal Declaration possesses a moral force in the world at large which grows in strength whenever reference is made to its terms as a source of inspiration or guidance. Such occasions have been frequent since 1948.

In proclaiming as a standard the right of "everyone" to have a nationality the Universal Declaration seeks to lessen the human suffering - or at a minimum, the hardship - which confronts those persons who must exist without the protection of any State and who may enjoy rights and privileges only at sufferance in the country where they are sojourning. Under

traditional concepts, States have been the only "proper" subjects of international law, since it is only a State which has capacity to sue in an international tribunal or which has the power to protest through diplomatic channels.[137] While these traditional concepts have been challenged in the modern age by a more inclusive view of the participants in international law,[138] the tie of nationality remains the foremost protection for the individual in the international arena.

Most frequently, the disabilities resulting from statelessness have befallen the individual through no fault of his own - either he has been rendered stateless by political vicissitudes, or by the happenstance of the place of his birth and of his parentage. Classically, nationality at birth has been determined on the basis of the place of birth - a territorial concept, the jus soli, or on the basis of the nationality of the parents - a personality concept, the jus sanguinis. Thus, a child born in a territory which recognizes the jus sanguinis exclusively, of parents whose national state adheres exclusively to the jus soli, would be stateless.

Yet, in enunciating the right of an individual to have a nationality the Universal Declaration does not call for the denial of the right of a State to denationalize. Paragraph 2 of Article 15, which qualifies paragraph 1, requires only that, "/n/o one shall be arbitrarily deprived of his nationality..."

(emphasis supplied) An examination of the background of the adoption of this language will be necessary for an adequate appraisal of its significance.

In the Preface to his book, An International Bill of the Rights of Man, Sir Hersch Lauterpacht expressed his conviction that there existed an impirically demonstrated need for a declaration of the fundamental rights of man:

> "In the course of the second World War 'the enthronement of the rights of man' was repeatedly declared to constitute one of the major purposes of the war. The great contest, in which the spiritual heritage of civilization found itself in mortal danger, was imposed upon the world by a power whose very essence lay in the denial of the rights of man as against the omnipotence of the State. That fact added weight to the conviction that an international declaration and protection of the fundamental rights of man must be an integral part of any rational scheme of world order. However, the idea of an International Bill of the Rights of Man is more than a vital part of the structure of peace. It is expressive of an abiding problem of all law and government. So long as that problem remains unsolved, it will continue to be both topical and urgent long after declarations of war and peace aims have become a matter of mere historical interest and after the effective elimination of war has become a reality. But it is a problem which cannot be solved except within the framework and under the shelter of the positive law of an organized Society of States."[13]

Recognizing the need for a statement in terms of positive law acknowledging human rights and fundamental freedoms, if one

of the objects of the Organization of the United Nations, as contained in the Dumbarton Oaks Proposals, was to be fulfilled, Lauterpacht formulated an International Bill of the Rights of Man. Article 8 of this International Bill conferred a right to a nationality:

> "Every person shall be entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent. No person shall be deprived of his nationality by way of punishment or deemed to have lost his nationality except concurrently with the acquisition of a new nationality."[140]

The stated aim of this article was to secure a nationality to all persons, and to abolish statelessness as a condition recognized by international and municipal law. Inasmuch as it is through the State of which he is a national that an individual obtains the protections and benefits of international law, Lauterpacht cited what he called the "glaring inconsistency" between the prerequisite of nationality and the recognition of statelessness as a condition permitted by international law. While he acknowledged that the abolition of statelessness was of limited importance in comparison with other fundamental human rights, Lauterpacht nonetheless asserted that it was essential to the status of the human personality in both international and municipal law to "do away with that offensive anomaly."[141] In his view,

"/t/here is no major permanent interest of States which stands in the way of this much-needed reform."[142] Motivated by a similar appreciation of the human values expressed by Lauterpacht, the First Session of the United Nations Commission on Human Rights established a Drafting Committee in March of 1947 to prepare a statement of human rights and fundamental freedoms.[143] During its First Session, from 9 to 25 June 1947, the Drafting Committee distinguished three objectives for its work: (1) the adoption of a draft international bill of human rights, (2) the adoption of a convention on human rights and (3) the adoption of measures of implementation designed to insure observance of human rights. Also during its First Session, the Committee considered a Draft Outline of an International Bill of Human Rights of the United Nations Secretariat. This Draft Outline contained the following provisions relating to a right to a nationality:

> "Art. 32. Everyone has the right to a nationality.
>
> Everyone is entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent.
>
> No one shall be deprived of his nationality by way of punishment or be deemed to have lost his nationality in any other way unless he concurrently acquires a new nationality.
>
> Everyone has the right to renounce the nationality of his birth, or a previously acquired nationality, upon

"acquiring the nationality of another state."[144]

The Drafting Committee also considered suggestions for articles to be incorporated in an International Bill of Rights, or amendments to articles already incorporated in the Draft Outline submitted by the Secretariat. With respect to the question of a right to a nationality, the United States proposed that Article 32 of the Draft Outline be altered to state simply, "Every person shall have the right to a nationality."[145] The Representative of France proposed that Article 32 read:

> "Every person has the right to a nationality.
>
> It is the duty of the United Nations and Member States to prevent statelessness as being inconsistent with human rights and the interests of the human community."[146]

In accordance with the decision to divide its work into the preparation of a bill of human rights (in the nature of a declaration or manifesto), an international convention and measures of implementation, the Drafting Committee appointed working groups to draw up the various provisions. The working group on the bill of human rights consisted of the Representatives of France, Lebanon and the United Kingdom; it was felt that greater consistency would be achieved if the articles were drawn by one person and the Representative of France,

Professor René Cassin, agreed to prepare a preliminary draft. Professor Cassin's draft consisted of forty-four articles, which were reviewed by the other two members of the working group and discussed by the Drafting Committee. On the basis of these discussions, Professor Cassin undertook to revise his draft to incorporate the views expressed by Member States. This revision was adopted by the Drafting Committee in its report to the Commission on Human Rights as its suggestions for articles to be included in an International Declaration on Human Rights. In this draft, the provision for a right to a nationality appeared as Article 18:

> "Everyone has the right to a nationality. /The Drafting Committee expressed the opinion that this article should be considered at greater length as the subject of a Convention.7"[147]

Thus, from the very definitive wording which would have eliminated statelessness, contained in the Draft Outline prepared by the Secretariat, the provision for a right to a nationality was reduced to a general principle in view of the reluctance of States to bind themselves in a matter so traditionally one of their domestic jurisdiction. The draft articles adopted for consideration in an international convention on human rights and fundamental freedoms, which were primarily based on submissions by the United Kingdom Representative, Lord Dukeston,[148] contained no provision on the question of nationality.[149] The draft "convention" was a much more

abbreviated document than the "declaration", and represented the minimal area of agreement on which a consensus was more likely.

At its Second Session from 2 to 17 December 1947, the Commission on Human Rights established three working groups on (1) the declaration, (2) the convention and (3) measures of implementation, to study the proposals of the Drafting Committee. The working group on the declaration produced a revised Draft International Declaration on Human Rights: in this draft, the right to a nationality became Article 15:

> "Everyone has the right to a nationality. All persons who do not enjoy the protection of any Government shall be placed under the protection of the United Nations. This protection shall not be accorded to criminals nor to those whose acts are contrary to the principles and aims of the United Nations."[150]

The Drafting Committee met for its Second Session in the Spring of 1948, and undertook a re-draft of the articles of the Declaration proposed by the Second Session of the Human Rights Commission, taking into consideration the comments of Governments and international organizations to which they had been submitted. The revision of Article 15 dropped the provision for United Nations protection of stateless persons and left intact only the first sentence, i.e., "Everyone has the right to a nationality."[151] A Note following this revision of Article 15 contained the proposal of the Representative of the

Soviet Union for the addition of the following text after the first sentence:

> "The cases and procedure of depriving a person of his nationality must be determined by national legislation."[152]

The Third Session of the Commission on Human Rights, which met in June of 1948, examined the proposals of the Second Session of the Drafting Committee article by article and adopted a new text of a Draft International Declaration of Human Rights. The right to a nationality was further altered in this draft, and appeared as Article 13:

> "No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality."[153]

The formulations of the Third Session of the Human Rights Commission were transmitted to the Seventh Session of the Economic and Social Council. In view of the press of time, on 26 August 1948 the Economic and Social Council forwarded the draft as submitted by the Human Rights Commission to the General Assembly where it was considered in the Third Committee and in Plenary Session.

It is apparent that the drafters of the Declaration recognised the need for a positive statement of a right to a nationality as an abstract principle, particularly to guard against wholesale and arbitrary denationalisation and to counteract the anomaly posed by statelessness in international

law. In addition, without such a statement, the draft would have been incongruous on its face, since certain political rights enunciated in the Declaration require the possession of nationality for their enjoyment.[154] However, it is equally apparent that some States were unwilling to surrender their right to legislate freely with respect to nationality and in some instances to impose denationalization, even when to do so would result in statelessness. There was no consensus on giving up such a traditional sovereign right as freedom of unilateral action in cases of denationalization. The diversity of opinion on this score can readily be seen in the comments of Member States when the matter was discussed in the Third Committee.[155]

At the outset of the discussion of Article 13 in the Third Committee, consideration was focused on a number of proposed amendments to the text.[156] These amendments reflect the polarity of views held by the nations submitting them. On the one hand, the Soviet Union sought to strengthen the power of the individual State to deprive a person of his nationality through an amendment which, in effect, restrictively defined "arbitrary" deprivation of nationality as something other than deprivation according to the provisions of national law.[157] On the opposite hand, France proposed the positive assertion of a right to a nationality as a first paragraph (thus making the text submitted by the Human Rights Commission appear

as the second paragraph), and called for the addition of a third paragraph which declared that the United Nations had a special responsibility to prevent statelessness and to protect stateless persons.[158] Uruguay proposed that the word "unjustly" be substituted for "arbitrarily".[159]

During the course of the debate, Member States expressed disparate views. There was some opposition to a definite statement of a right to a nationality on the ground that such an assertion might be interpreted to require the United Nations as a body to confer nationality to eliminate any hiatus created by national legislation. Supporters of the amendment denied any such required outcome, however.

With respect to the meaning of the word "arbitrarily" there was a wide range of opinion. The Belgian Representative favored retaining the word "arbitrarily" since "it did not preclude the possibility of depriving persons of nationality as a sanction in exceptional cases."[160] Mr. Rural of Turkey found the word capable of being "interpreted from very different points of view" and, thus, too "subjective"; he favored the word "illegally" as forbidding any action "taken outside the scope of the law."[161] The Representative of Bolivia proposed that the position of the word "arbitrarily" be shifted to modify only the denial of the right to change nationality. He opined that "deprivation of nationality should not be

contemplated in any circumstances whatever"; and he continued, "Nationality was an inalienable human right."[162]

Mrs. Franklin D. Roosevelt, the Representative of the United States of America, stated that her delegation supported the basic text of Article 13 which was "designed to make clear first, that individuals should not be subjected to action such as was taken during the nazi regime in Germany when thousands had been stripped of their nationality by arbitrary government action; and, secondly, that no one should be forced to keep a nationality which he did not want and that he should not therefore be denied the right to change his nationality." While she felt that the basic text was best from a practical point of view, because of the complexities involved in questions of nationality, Mrs. Roosevelt indicated that the United States would not oppose the inclusion of a provision to the effect that everyone had the right to a nationality. She stated that, while she would like to feel, as did the Bolivian Representative, that nationality was inalienable, such an attitude "hardly seemed realistic." The United States supported adoption of the word 'arbitrarily', which "implied unexpected, irresponsible action without regard for either law or right and was thus stronger than the word 'illegally' or the word 'unjustly'."[163]

The United Kingdom Representative commented that the

word "arbitrarily" was used "to describe action for which the agent was not required to show just cause either before a court of law or before public opinion."[164] In responding to critics of the Soviet position, Mr. Pavlov of the USSR emphasized his unwavering view that questions of nationality were solely within the internal competence of a State, and that granting or depriving of nationality were sovereign prerogatives; in his opinion it was contrary to Article 2, paragraph 7 of the United Nations Charter for the declaration to concern itself with such matters.[165]

In the voting on the amendments on 6 November 1948, the USSR proposal to define the word "arbitrarily" in a restrictive sense was defeated by 26 votes to 7, with 3 abstentions. The insertion of a preliminary paragraph proclaiming the right of everyone to a nationality was adopted by 32 votes to 9, with 6 abstentions. The Bolivian amendment to transpose the word "arbitrarily" to apply only to the right to change one's nationality, and the amendments to substitute the words "unjustly" and "illegally" for "arbitrarily", were all defeated by wide margins.[166] Article 13, as amended, was adopted in the Third Committee by substantial majorities.[167]

Following the Third Committee's adoption of the individual draft articles, a Sub-Committee was appointed to study the Declaration as a whole from the point of view of "arrangement, consistency, uniformity and style". The report of this

Sub-Committee was adopted by the Third Committee and a draft Universal Declaration of Human Rights was recommended to the General Assembly on 6 December 1948. In the draft forwarded to the General Assembly, the right to a nationality appeared as Article 16 as the result of some re-arrangement by the Sub-Committee. Following discussion by the General Assembly in Plenary Session, votes were taken on each article separately, and thereafter on the Declaration as a whole. No specific mention was made of the nationality article during the Plenary Session.[168] The right to a nationality, which became Article 15 because of a joinder of two articles by the General Assembly, was adopted unanimously; the vote on the entire Universal Declaration of Human Rights resulted in its adoption by 48 votes in favor to 0 against, with 8 abstentions.[169]

B. Present and Future Implications of Article 15

In view of the rejection by the Drafting Committee and the Human Rights Commission of the strong, positive language of the Secretariat's Draft Outline which would have eliminated statelessness, it cannot be said that the proposed article on the right to a nationality was ever conceived as establishing a standard calling for an absolute prohibition of unilateral denationalization. While some States did indicate a willingness to surrender their exclusive national competence in this area of law, in favor of establishing an international human

rights norm which would deny the right to denationalize, there was absolutely no consensus on so doing.

As discussed above, the Universal Declaration was not intended to be a legally binding international committment, but was, rather, a standard of achievement toward which nations should aspire. It would be a false conclusion to state that the Universal Declaration leaves unimpaired the traditional international law norm of imposing no effective limitation on a State's authority over matters concerning loss of its nationality, since it was never designed to have a direct, operative effect upon international law. Until such time as the Convention on the Reduction of Statelessness (or some other international convention on nationality) comes into effect, customary international law remains as the legal standard. Of course, even if a convention is adopted it is binding only upon the parties thereto, unless in time the norms which it prescribes gain such general acceptance among nations that they themselves become customary international law, replacing the prior standard.

Considered as a human rights standard, against which States may measure their own national legislation, Article 15 does not call for the renunciation of the power to denationalize. The use of such power, however, is qualified by the language of paragraph 2 of the Article, i.e., "No one

shall be arbitrarily deprived of his nationality...." It is not possible to ascribe any precise meaning to the word "arbitrarily", in view of the disparate interpretations given it in the Third Committee debates. Nevertheless, as can be seen from the rejection of the proposed Soviet amendment which would have so limited its applicability, it would appear that the word does require something more than that an action prescribing denationalization conform to the provisions of national law. Thus, it can be said that the participants in the decision-making process did establish a higher standard than a mere conformity to law for States exercising the power to denationalize. While national law must naturally be observed by State authorities, that law itself must measure up to a standard of justice, right or reasonableness.

Although not an absolute, the right of everyone to possess a nationality does exist as set forth in the Universal Declaration as a standard of general aspiration. However, in any appraisal of the right to a nationality as a human right, consideration should be given to its relative importance in the whole spectrum of human rights. In an era when an individual's protection depended upon his possession of a nationality, it was a right of great importance. Inasmuch as states were recognized as the only participants in the arena of international law, without a country to do battle for him when he was oppressed in foreign lands, the lot of an individual alien

could be a sorry one indeed. Theoretically, the stateless individual had "rights" only at sufferance: his fortunes could be disposed of at will if he had not the benefit of diplomatic aid and, ultimately, the opportunity of repairing to his "own" country where he could live in safety. However, as concern for individual human rights and fundamental freedoms has grown in the conscience of the international community, the individual himself has become more of a participant in international law.

Article 2 of the Universal Declaration of Human Rights proclaims that the 'rights and freedoms' contained in the Declaration are available to everyone "without discrimination of any kind". They are not limited to the nationals of each particular State. The same concept of universal applicability has been adopted in regional human rights conventions concluded since the Universal Declaration, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,[170] and the American Convention on Human Rights of 22 November 1969 (the Pact of San Jose, Costa Rica).[171]

As the fundamental rights of individuals as human beings are increasingly recognised as a subject of international concern and protection, and the individual himself is recognised as a participant in international law, the right to a nationality declines in relative importance. The argument that an

individual lacks protection without a national tie is undermined by the international protection afforded him on the basis of human rights. Nonetheless, an individual's political rights, such as the right to participate in government, are inevitably tied to nationality.[172] Such substantial human rights as these require protection, and thus the standard set forth in Article 15 of the Universal Declaration remains of abiding relevance.

Essentially the Universal Declaration condemns denationalization on a massive scale, or for discriminatory or political purposes; it strikes against the power of an authoritarian State to deny a segment of its people, or certain disfavored individuals, the benefits and privileges afforded to citizens by rendering them stateless. It may also be said that denationalization for ordinary criminal offenses, readily punishable in other ways, should also find condemnation under the Universal Declaration. With respect to the problem of dual nationals, it has been argued that Article 15 contemplates the possession of only one nationality at any one time; thus, in the case of dual nationals, Article 15, paragraph 1 would imply an obligation on the part of all but one of the States to give up their claims of nationality.[173]

In resolving questions concerning loss of nationality,

the national decision-makers of Member States of the United Nations, on legislative, judicial and administrative levels, must take into consideration the standards contained in the Universal Declaration. One of the purposes of the United Nations, as set forth in Article 1, paragraph 3 of its Charter, is "/t/o achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all..." In addition, Article 55 of the Charter states:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> ****
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

This undertaking is followed by Article 56 which pledges Members to take affirmative action toward "the achievement of the purposes set forth in Article 55."

Thus, despite the fact that the Universal Declaration itself lacks the binding force of an international convention, the legal obligations undertaken under the Charter of the United Nations make it incumbent on Member Nations to examine their domestic legislation with a view toward determining its conformity with human rights standards.

Such an examination must be made by United States decision-makers in any appraisal of Section 349(a)(3) of the Immigration and Nationality Act of 1952. A review of this statutory provision for the loss of United States nationality as the result of unauthorized foreign military service reveals that it has a very distinguishing feature from the arbitrary denationalization condemned by the Universal Declaration. In instances of unauthorized foreign military service the individual citizen brings upon himself the consequences of his own conduct -- assuming that conduct to be uncoerced. Further, foreign military service by a citizen represents something other than a complete loyalty to his country since he must also bear loyalty to the nation which he serves, even if only temporarily. By serving abroad the citizen may be aiding causes disapproved by his government, or toward which his government may desire to assume a neutral position, thus jeopardizing its conduct of foreign relations. Or indeed, the citizen serving in a foreign armed force may find himself in direct opposition to his own country -- possibly inadvertently.

Loss of United States nationality can, and should, function as a deterrent to foreign adventurism through service in other nations' armed forces. In maintaining such a deterrent, the United States conserves its own legitimate values by regulating its manpower resources and in avoiding international

discord caused by the actions of its citizens. Internationally, there is no legitimate value to be served by permitting the citizens of the United States to serve without authorization in another nation's armed forces, thus contributing to a war-making potential. Individuals who undertake such unauthorized foreign armed service, do so with the realization that the society whose interests they have disregarded no longer desires to claim them as its own. Section 349(a)(3), therefore, should not be condemned as an arbitrary act by the United States, and the Supreme Court in sustaining its enforcement would not be acting contrary to the standard of achievement contained in Article 15 of the Universal Declaration of Human Rights.[174]

VI Neutrality and the Control of Volunteers

A. Public International Law and Neutral Volunteers

Neutrality has been defined as an attitude of impartiality adopted by third States toward belligerents which creates rights and duties between the impartial States and the belligerents.[175] By virtue of the rights and duties created between subjects of international law, neutrality is regulated by public international law. Considered in its classical sense, the law of neutrality governs solely the activities of States. As stated by McNair and Watts:

> "It is, strictly speaking, incorrect to speak of a person being neutral, though loosely the term may be used to denote the subject of a neutral State."[176]

While neutrality has been described as an "attitude of impartiality", it is in fact much more than an attitude. The impartiality posited as a criterion must be carried out in conduct. The word "impartiality" itself implies a nonparticipation on any side of a particular coercion situation. However, "nonparticipation" is not the only implication to be derived from "impartiality"; it is also susceptible of being interpreted to mean "treating all alike". It takes but a moment's reflection to see that "nonparticipation" and "treating all alike", when applied to an international conflict situation, are conceptually incompatible. To determine which concept is most useful in discussing neutrality, it is

necessary to examine what values neutrality seeks to promote.

From whatever approach has been adopted, and despite the variety of motives behind those approaches, it can be seen that the primary value which neutrality has fostered is the prevention or minimization of the spread of war and international violence, and thereby, the avoidance of war's baleful consequences in the destruction of other essential community values, such as human life, economic well-being and security, and so forth. If this analysis of the primary value fostered by neutrality is accepted as accurate, it will be observed that only the concept of neutrality as 'nonparticipation" will contribute to its furtherance. A conception of neutrality as 'treating all alike' may succeed in avoiding the ire of competing belligerents (although not always), but it does not advance the cause of prevention or minimization of the spread of war and international violence. If belligerents may draw on the resources of 'neutrals' equally, the flames of coercion are only fed and the danger of its spread continues to exist.

Thus derived from the term 'impartiality", the word-symbol "nonparticipation" is more precise than that of "neutrality" and, therefore, more useful in conveying meaning. Hence, neutrality may be defined as the nonparticipation of

a State in an international coercion situation, which nonparticipation is productive of rights and duties between the nonparticipant State and the individual belligerents. Nevertheless, because of the abundant use of the word "neutral" in public international legal literature and understanding, it will be used occasionally in this paper, but only as an equivalent of 'nonparticipant'.

Of course, it is in the political arena that the decision is made as to whether or not a State will remain a nonparticipant with respect to a particular international coercion situation. Oppenheim-Lauterpacht states that there is no duty under international law for a State to remain neutral toward a conflict, unless a prior treaty expressly so provides;[177] however, such an interpretation may be subject to question at the present time in its application to Member-States of the United Nations. In view of the requirement of Article 2(4) of the Charter,[178] that Members:

> "...refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

it is arguable that, unless they may invoke their right of self-defense under Article 51 of the Charter, or their obligation to participate in United Nations collective enforcement measures, Member-States do have a duty under international law

to remain nonparticipants with respect to breaches of international peace. The advent of the United Nations in the international arena certainly has had a profound affect upon customary laws of neutrality. It is clear that when the United Nations calls for collective enforcement measures under the Charter, Member-States have the obligation to render assistance in consonance with that call. Member-States may not remain nonparticipants in the face of the world community's condemnation of aggression. It cannot be assumed, however, that in all international coercion situations aggression can be determined, the guilt of a particular belligerent identified and that the United Nations can and will take enforcement action. As summarized by Oppenheim-Lauterpacht:

> "While the Charter has affected in a decisive way the right of the Members of the United Nations to remain neutral, it has not substantially abolished their right to neutrality either in wars between Members of the United Nations or in wars between non-Members or between Members and non-Members. In principle no Member of the United Nations is entitled, at its discretion, to remain neutral in a war in which the Security Council has found a particular State guilty of a breach of the peace or of an act of aggression and in which it has called upon the Member of the United Nations concerned either to declare war upon that State or to take military action indistinguishable from war. This is the cumulative effect in Article 2(5) of the Charter (in which Members undertake to give the United Nations every assistance in any action it takes in accordance with the Charter); of Article 25 (in which Members undertake to accept and to comply with the

> "decisions of the Security Council) and of the provisions of Chapter VII of the Charter in the matter of 'enforcement action'. However, apart from the precise case referred to above and which, in general, leaves no right to or room for neutrality, there must be envisaged situations which are clearly consistent with the continued neutrality of the Members of the United Nations."179

McDougal and Feliciano suggest that in the absence of a binding decision by the Security Council to take enforcement action, States may look to a resolution of the General Assembly as authorization to "... appraise the lawfulness of each belligerent's cause and accordingly to discriminate in its demands."180 This view may be overly sanguine for a nation such as the United States, however. In an era of super-power confrontation with its attendant risks, political realities may make participation in an international conflict through discrimination on one side an impossibility. Even if political considerations posed no bar, the rights and wrongs of a particular conflict may not be so clearly discernable that discrimination would be justified. Hence, the laws of neutrality continue to have relevance in public international law.

The rights and duties of States seeking to remain non-participants may be classified generally as those of abstention and of prevention. States must abstain from taking any action which would evince an inclination to render assistance to one

belligerent which would be detrimental to another. At the same time, nonparticipant States have the duty -- and the right -- to prevent belligerents from making use of their territory and their resources for military purposes. As viewed by Oppenheim-Lauterpacht, this duty of prevention "... applies not only to actual fighting on neutral territories, but also to the transport of troops, war material, and provisions for the troops, the fitting out of men-of-war and privateers, the establishment of Prize Courts, and the like."[181]

Schwarzenberger adds a third category -- that of acquiesence -- in his summarization of the rights and duties of neutral powers:

> "First, a neutral State must abstain from taking sides in the war and from assisting either belligerent.
> Secondly, a neutral State has both the right and duty to prevent its territory from being used by either belligerent as a base for hostile operations.
> Thirdly, a neutral State must acquiesce in certain restrictions which belligerents are entitled to impose on peaceful intercourse between its citizens and their enemies, in particular, limitations of the freedom of the seas."[182]

Such traditional views of the rights and duties of neutral powers make a clear distinction between the activities of a State itself in its 'corporate' personality and the activities of a neutral State's individual nationals. The obligations

imposed upon a State by virtue of its nonparticipation "... do not extend to spontaneous unneutral activities on the part of its citizens or corporations entitled to its nationality. These may, at their own risk assist either belligerent."[183] Thus, while a neutral State may not grant loans or supply munitions to belligerents, individual subjects of the nonparticipant State are not so prevented.[184] While some States have sought to eliminate friction by forbidding their nationals to engage in such activities through domestic legislation, such restrictions are dictated by political motives rather than any requirement of customary international law. However, domestic legislation which forbade assistance other than to all belligerents alike would surely violate the duty of abstention in nonparticipation.[185]

This distinction between the activities of neutral States themselves and the activities of their nationals found sanction in Hague Convention V on the Rights and Duties of Neutral Powers and Persons in War on Land,[186] and in Hague Convention XIII on the Rights and Duties of Neutral Powers in Naval War.[187] Both of these Conventions, which were concluded at the Second Hague Peace Conference of 1907, contain the provision that they "... do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."[188] Because of these "general participation" clauses, the Conventions were not applicable as treaties during

most of World War I and during World War II since all belligerents were not parties.[189] (The most notable non-party was the United Kingdom.[190]) Nevertheless, the Conventions are regarded as an expression of the customary international law of neutrality and they have been frequently cited in this sense.[191] With respect to the public international law governing neutral "volunteers", it is Hague Convention V which is directly applicable.

Article 4 of Hague Convention V provides:

> "Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents."

Article 6 of Hague Convention V reflects the distinction between the actions of a neutral State and the actions of individuals:

> "The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separating to offer their services to one of the belligerents."

Thus, neutral Powers are obliged by Article 4 to prevent the organization of volunteer armed forces within their territory for the benefit of a belligerent, including the recruitment of such volunteers, and, by implication of Article 6, to prevent the passage from their frontiers of men organized in a body for the purpose of enlisting in the forces of a belligerent. However, no such duty of prevention arises with

respect to the departure of individuals (including their own nationals), whether they be few or many, who leave with the intention of volunteering in the armed forces of a belligerent. The criterion for determination of State responsibility for prevention under customary international law is "organization". The passage of organized volunteers through a nonparticipant's territory takes on the character of the passage of troops, and the act of organizing volunteers on neutral territory is tantamount to the formation of a hostile expedition, both of which violate the nonparticipant's duty of prevention.[192] As long as individual volunteers, even those travelling together, do not cross the frontier as a body, the responsibility of a State is not engaged.

Naturally, when numbers of volunteers are involved at one time, or when a consistent pattern of exodus is discernible, the point where individual action ceases and organisation begins may be imprecise. Yet it is at this possibly imprecise point that a neutral State must take cognisance of the fact that its territory is being used as a conduit of aid for a belligerent. In some instances, however, governmental complicity is open to little doubt. This issue was contested in United Nations debates when Communist Chinese forces entered the Korean Conflict on the side of North Korea. Spokesmen for the [then] Communist bloc claimed that the Chinese participants were merely volunteers, and that, even though they

crossed the frontier in numbers, they were acting as individuals. Such an argument was hardly tenable in light of the facts, and in January of 1951 the Security Council condemned Communist China for its aggression. It may be safely said that in any frontier passage of the magnitude of the Communist Chinese invasion, any attempted distinction between individual action and a countenanced hostile expedition (if not an outright attack) is entirely cerebric.

Despite any difficulties in line-drawing, the test of legitimacy of volunteers of nonparticipant nationality has been "individual action", and "... the subjects of neutral States who thus enlist do not thereby commit any offense against the rules of International Law."[194] In practice the United States has adhered to the distinction between individual and organized activity of volunteers. When Ambassador Zamacona of Mexico complained of the arrest of Mexican citizens who were departing the United States to take part in revolutionary disturbances in Mexico, Secretary of State Knox stated in the course of his reply:

> "Again I should call Your Excellency's attention to the fact that in international law and under the Federal Statutes of this Government a very wide difference exists on the one hand between the passage of men singly and in small groups across our frontier and into another country, or the sailing of individuals or small groups in the ordinary course of events from one of our ports, and on the other hand the departure from our territory of organized groups of men avowing

"the purpose of undertaking belligerent activities in foreign territory.

****

In this connection I must again repeat to Your Excellency that not only is there no rule of international law requiring, and no local Federal statute that would permit, the Federal officials of this Government to prevent the passage into foreign territory of unarmed and unorganized men either singly or in groups, but on the contrary it is an express provision of international law that the responsibility of a neutral power is not engaged even in time of recognized war by the fact of persons crossing the frontier separately to offer their services to one of the belligerents; and as to the mandates of municipal law, the courts of the United States have repeatedly declared that our neutrality statutes do not forbid one or more individuals singly or in unarmed, unorganized groups from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country."[195]

In a communication to the Department of the Navy of October 23, 1940, relating to the service of United States citizens in the armed forces of foreign States, the Department of State declared:

"Sections 21 and 22 of Title 18, U.S. Code, provide penalties for entry or the hiring of others for entry into the armed forces of a foreign state when such acts are committed within the territory or jurisdiction (not extra-territorial jurisdiction) of the United States, but there is no penalty in the general laws of the United States where citizens of the United States go abroad and while abroad enter the armed forces of a foreign state."[196]

Present statutory prohibition of foreign enlistment

within the territory of the United States, or recruitment of others within the territory of the United States, is contained in 18 U.S.C. §959(a):

> "Whoever, within the United States enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both."[197]

Contrary to Oppenheim-Lauterpacht's assertion,[198] it is not a crime under United States law for an individual, whether or not a citizen, to depart the country with intent to enlist in a foreign military service, nor does the law prevent individuals from so doing. However, whether or not it was an intentional attempt to fill this hiatus in United States neutrality laws, Section 349(a)(3) of the Immigration and Nationality Act of 1952 does direct its thrust against individual foreign military service, although it does not make such conduct criminal.

In the United Kingdom, statutory prohibition of volunteer enlistment in foreign armed forces is contained in the Foreign Enlistment Act of 1870. This Act, which is based on a similar statute of 1819, makes it an offense for any British subject to accept without license of the Crown "... any commission or engagement in the military or naval service of any

foreign State at war with any foreign State at peace with Her Majesty", or to leave the country with the intent to accept such commission or engagement.[199] These prohibitions are directly aimed at preserving neutrality in international coercion situations since they are dependent on the existence of states of "war" and "peace". In McNair's view, however, the term "war" has a more inclusive connotation than a strictly defined state of declared war, and would extend to hostilities of lesser magnitude.[200] He takes the further view that enlistment in United Nations forces, or in the forces of a State which the United Nations is assisting, is possibly subject to the sanctions provided by the Act, as long as the State against which they are fighting is at peace with the Crown.[201]

Although they go beyond the requirements of customary international law, provisions in domestic legislation restricting neutral volunteers do have a significance for the customary law in that they represent a trend toward strict forms of neutrality.[202] As stated by Bromlie:

> "The customary law in all aspects is clumsy, uncertain and ineffective, and it is hardly surprising that it has been modified in various ways. Innumerable municipal provisions prohibiting and punishing foreign enlistment exist. ..."[203]

Such restrictions in domestic legislation indicate a recognition by States of their responsibility for the actions

of their nationals abroad when those actions are within their control, and an unwillingness to be drawn by their nationals into a position of participation in an international conflict which they might otherwise seek to avoid. In so doing, States enacting these regulations maximize the primary value of nonparticipation in coercion -- the prevention or minimization of the spread of war and international violence.

B. The Decline of Governmental Laissez Faire

The "impeccable"[204] distinction made by customary international law between organized groups of volunteers departing a nonparticipant State's territory and individual volunteers departing on an unorganized basis, reflects the conception of a political, economic and social organization prevalent in Western Europe and the United States in the last century.[205] This conception, most commonly known as laissez faire, placed a premium upon individual initiative -- particularly in the economic sphere -- and relegated to governmental activity only those circumscribed functions thought to be appropriate in an era of emerging individualism. Part and parcel of this concept was the view of an international community wherein only States were effective participants: thus international relations and responsibilities were the province of Statecraft, outside of which the private sector of society operated freely. It was in such an intellectual

climate that the customary international law of neutrality developed which eventually found embodiment in the Hague Conventions of 1907.

The political, economic and social developments of the twentieth century, however, have virtually eroded the nineteenth century dichotomy between the actions of a State and its individual inhabitants. Observed history and common experience bear witness to the extension of governmental control and regulation into virtually all aspects of life, most notably the economic aspect. As domestic and international social life becomes more complex it is not to be expected that such governmental influence will decline. McDougal and Feliciano state:

> "Even in nontotalitarian orders, ... governments commonly exercise extensive control over the movements of capital, goods, and services across their boundaries, utilizing a large variety of control techniques and devices, such as exchange controls, tariffs, import quotas, export licensing, bilateral balancing of trade, and the like. In periods of crises and emergency, i.e., of overt violence or high expectations of violence, public control is commonly intensified and broadened such that the private (nongovernmental) entities and individuals involved in an act of exportation or importation may actually be little more than nominal participants. The crucial points are that decisions on the important aspects of foreign trade -- direction, content, volume, financing, and so forth -- are either made by government officials directly or are subject to their approval and that the private parties in fact

> "function as instrumentalities of state policy."[206]

While it may be considered as established that the international law of neutrality requires a nonparticipant State to prevent the recruitment of volunteers and the mounting of hostile military expeditions in its territory -- and that governmental connivance in the same, or indifference to overt manifestations thereof, is an international delict -- there remains the "curious paradox"[207] of the freedom of action accorded the individual volunteer of nonparticipant nationality. Yet, to continue to insist that a State may remain neutral while its citizens may participate in an international conflict, is to engage in a sophistic niceness which should find no place in present day international law. Brownlie opines:

> "With an increase in the definition and comprehensive nature of the citizen's rights and duties <u>vis-a-vis</u> the State, there must be a change in the character of the volunteer."[208]

Not only have the presuppositions which underlay Article 6 of Hague Convention V practically disappeared with the "integration of the individual in the State corpus",[209] but the vague criteria of the customary law have always been productive of abuse. Such abuses probably occurred in the formation of the U.S. Eagle Squadrons which enlisted in Canada in 1940-1941 and the Flying Tigers formed by Colonel Chennault in the Sino-

Japanese conflict.[210] Previous controversies involving neutral volunteers have primarily focused on the extent of governmental control of, and participation in, their activities; but it is only by redefining a nonparticipant State's duty of prevention in terms of increased responsibility for individual action that a viable solution to such controversies can be obtained.

If it is postulated that neutrality is nonparticipation in international coercion situations, it may be reasoned that a belligerent has a legitimate claim in demanding that the nonparticipant prevent the utilization of its resources by the opposing belligerent. Such resources cannot be logically confined to the territorial and material resources of a nonparticipant State, but extend to its human resources as well.[211] If a nonparticipant State culpably fails to exercise its duty of prevention, it can no longer lay claim to nonparticipation status; it is leagued with the belligerent gaining the advantage.

One of the legitimate expectations of the peoples of the world is that international society will seek to localize war and to minimize the danger of its spread.[212] Such an expectation can be furthered if States recognize responsibility for the private actions of their individual citizens when such actions have an operative effect upon international relations

and the values which a world public order seeks to foster.[213] Actions which contribute to the spread of war and international violence should be prevented.

> "If the foregoing observations be correct, the interests of the world society will be adequately served if the States effectively refrain from augmenting the fighting forces of the belligerents in an international war, or the insurgents in a civil strife, or of an aggressor against whom the world organization takes enforcement action. The force of this suggestion reveals itself with all its cogency if it is considered that international conflagrations have their roots in local conflicts between minor States or in civil wars apparently confined to the territory of one State."[214]

It has been suggested that a nonparticipant State's duty of prevention should be extended to prohibition of the exit of volunteers.[215] However, such control of movement would operate as a qualification of Article 13, paragraph 2, of the Universal Declaration of Human Rights,[216] which provides:

> "Everyone has the right to leave any country, including his own, and to return to his country."[217]

In addition, the United States, the right to travel is considered to be an inherent right of every citizen which cannot be denied without compliance with Fifth Amendment due process.[218] To limit this freedom would indeed be odious, and, it is submitted, ineffective in preventing the departure of volunteers who seek to enlist abroad.

One possible solution in preventing the engagement of United States responsibility for the service of citizens in a belligerent foreign armed force can be discerned in Section 349(a)(3) of the Immigration and Nationality Act. In making loss of nationality a consequence of unauthorized foreign armed service, the nonparticipant status of the United States in international coercion situations is not jeopardized. In addition, the individual brings this consequence of his own uncoerced action upon himself. Enforcement of this statutory provision is not only permissable under public international law and international human rights standards, as previously considered, but it is in keeping with the increasing recognition of state responsibility in the laws of neutrality which bears a more accurate relation to the actual control exercised over private initiative.

VII Contribution of Israeli Law to the Controversy between the United States and Arab Nations

A. The Israeli Law of Return

Exacerbating the issue of the service of United States citizens in the armed forces of Israel is the effect of the Israeli Law of Return. The Law of Return, in conjunction with the Israeli Nationality Law, provides that all Jews have the right to immigrate to Israel, and that all Jews of full age who do so, obtain Israeli nationality unless they declare their desire not to become Israeli nationals upon their entering the country. Under these provisions of law, acquisition of Israeli nationality is not dependant upon renunciation of a prior nationality.[219]

Thus, by operation of law, United States Jews immigrating to Israel for settlement obtain dual nationality -- that of Israel and that of the United States -- without formal application and regardless of their volition, unless they declare a desire to the contrary. Although the absence of a rejection of Israeli nationality may be regarded as an affirmative indication of a desire to acquire it, this reasoning presupposes knowledge of the operation of the law and its implications on the part of immigrating Jews.[220]

The distinctive aspect of Israeli nationality laws as applied to Jews, conferring on them perhaps an unwitting dual

nationality, can be seen through contrast with Israeli naturalization provisions. Under these provisions, persons of full age, who do not obtain Israeli nationality under the Law of Return, by birth, or by virtue of being former Palestinian citizens who satisfy certain conditions of residence, may apply for Israeli nationality by naturalization. To obtain naturalization the individual must satisfy conditions of residence and knowledge of the Hebrew language, and must renounce his prior nationality or prove that he will cease to be a foreign national upon his becoming an Israeli national.[221] As a result, all non-Jews who immigrate to Israel and who apply for naturalization avoid obtaining dual nationality; naturalization for them requires an affirmative act of application with the renunciation of prior citizenship. The implications of acquiring Israeli nationality, with a conscious severence of former national ties and acceptance of the obligations of citizenship, should, therefore, be well understood by the non-Jew seeking naturalization. This is not necessarily so in the case of Jews who are given Israeli nationality by the Law of Return.

As Israeli nationals, immigrating Jews would naturally be subject to all laws of Israel effecting its nationals, including those requiring military service. The Israeli Defense Service Law does make Israeli nationals and permanent residents subject to conscription in the Regular Forces or Reserve Forces

of the Defense Army of Israel: in the case of males, such liability exists between the ages of eighteen and forty-nine years inclusive, and in the case of females, between eighteen and thirty-eight years inclusive. Males may be called into the Regular Service between the ages of eighteen and twenty-nine years inclusive, and females between eighteen and twenty-six inclusive; in the case of both sexes, the age limits are extended for medical personnel. All persons of military age found fit for service belong to the Reserve Forces when not on regular service. Permanent residents are defined by the Defense Service Law as those persons whose permanent residence is within the territory in which the law of the State of Israel applies, and whose permit of transitory residence, visitor's permit of residence or permit of temporary residence has been expired for six months without renewal.[222]

By virtue of these statutory provisions, United States citizens who are of military age and who are Israeli nationals or permanent residents, are bound to serve in the Israeli armed forces, regular or reserve. The problem thus posed the United States with regard to its relations with Arab countries is patent. Nor is the problem a de minimus one. Mr. Moshe Rivlin , Director General of the Israeli Absorption Ministry, stated in a speech given in the United States in November 1969, that Israel is experiencing a sharp rise in immigration since the 1969 Arab-Israeli War and that the total number of immigrants

for 1969 was anticipated to be between 50,000 to 60,000. A New York Times article reporting Mr. Rivlin's speech indicated that Israel's conscription law "... has meant that more than a hundred Americans have been called up, some of them veterans of Vietnam."[223] The article continued: "Immigration from the United States also has increased sharply since the 1967 Arab-Israeli war. Officials expect 7,000 to 10,000 immigrants from the United States next year."[224]

B. The Problem of Dual Nationals

As a matter of international law, the United States is unable to protect its citizens, who are also Israeli nationals, against the requirements of the laws of Israel when such dual nationals are subject to Israeli jurisdiction and have established an effective connection with the State of Israel through settlement there.[225] This principle of customary international law pertaining to dual nationals was codified in the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

> "Art. 4. A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[226]

In view of the frequently conflicting obligations which dual nationals owe to the States whose nationalities they possess, and the controversies between States which have arisen from their conflicting claims of personal jurisdiction, the

status of dual nationality is in general an undesirable one. Not only is it undesirable for the individual dual national who is subjected to competing demands, but it is also undesirable for the claimant States. The accusations of Arab governments, that the United States is permitting its citizens to serve in the Israeli armed forces, is an example of the embarrassment to which a nation may be subjected as a result of the recognition of dual nationality in international law. When United States citizens acquire obligations to a foreign State through dual nationality, the United States cannot prevent their fulfillment of those obligations when they are subject to that State's jurisdiction.

The retention of a former nationality when an individual has voluntarily acquired an additional nationality, and has established a permanent residence abroad, is an anomaly at variance with the sociological reality that the individual has identified himself with another society and national culture, has assumed the rights and obligations of citizenship therein, and has cast his lot with that society's prosperities or reverses. As stated by Bar-Yaacov, a contemporary Israeli writer in the field of dual nationality:

> "..., the concept of nationality implies a permanent condition involving the paramount obligation of the individual towards a particular State. The incompatibility of being a national of two or more States at one time lies not only in the psychological difficulty of being identified with several

> "States but also in the physical impossibility of performing simultaneously the rights and duties of citizenship in different geographical locations.
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> "Having in mind that most States naturalise only aliens who have taken up their residence within their territory, have been residing there for some length of time, and intend permanently to remain there, it would seem unreasonable for the home States to continue to assert their jurisdiction with regard to such persons and to require of them the duties of allegiance. It may be recalled that certain States have declined to accord diplomatic protection to nationals residing permanently abroad as, in the opinion of these States, the nationals concerned have not manifested such attachments to the country whose nationality they possess, as might entitle them to diplomatic protection."[227]

Nevertheless, a strict enforcement of Section 349(a)(3) of the Immigration and Nationality Act would not necessarily solve the problem of the dual national serving in the armed forces of his other nationality under current United States law.

In the case of Lehmann v. Acheson,[228] the Court of Appeals held that the citizenship-claimant, a native-born United States citizen who was also a citizen of Switzerland by virtue of his Swiss parentage, did not expatriate himself by taking an oath of allegiance to Switzerland incident to his conscription into the Swiss Army while he was living in Switzerland with his mother. In the Court's opinion, the conscription of a dual national into the armed forces of the

country of his other nationality was sufficient to establish prima facie that his entry and service in such armed forces was involuntary and did not result in the loss of his United States nationality.

A similar result was obtained in Correia v. Dulles,[229] where the plaintiff was born in the United States of Portuguese nationals, went with his mother to live in the Azores, and was conscripted into the Portuguese Army at the age of 20, taking an oath of allegiance to Portugal as a member of its armed forces. In that case, the Court stated:

> "The record in this case is wholly devoid of any evidence which would warrant any reasonable inference that plaintiff's entry into said armed forces was voluntary. It is conceded that he was conscripted and his contention that his induction was over his protests is uncontradicted. 'Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish prima facie that his entry and service were involuntary'. Lehmann v. Acheson, 3 Cir., 1953, 206 F.2d 592, 594."[230]

While it did not involve the loss of United States nationality through unauthorized foreign military service, in the case of Jalbuena v. Dulles,[231] the Third Circuit Court of Appeals dealt extensively with the obligations of dual nationals, saying:

> "The United States recognizes that a person may properly be simultaneously a citizen of this country and of another. Neither status in itself or in its necessary implications is deemed inconsistent with the other.'... The concept of dual citizenship recognizes

> 'that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. ... [D]ual citizenship ... could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other.' See Kawakita v. United States, 1952, 343 U.S. 717, at pages 723-724, 725, 72 S.Ct. 950, 956, 96 L.Ed. 1249. For present purposes the decisive point of all of this is that conduct merely declaratory of what one national aspect of dual citizenship necessarily connotes cannot reasonably be construed as an act of renunciation of the other national aspect of the actor's dual status.
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> "Certainly this citizen of the Philippines, residing in that country, was bound loyally to support and defend the fundamental law of that land just as he would be bound in this country to support and defend our Constitution. Despite each obligation he may remain a citizen of the other country. Hence, merely to acknowledge and declare the Philippine obligation in a Philippine passport application cannot reasonably have significance in derogation or renunciation of birthright American citizenship.'[232]

Although there are lower Federal Court cases where conscription of a dual national has been held not sufficient to render foreign military service involuntary and loss of United States nationality has resulted,[233] the Supreme Court in Nishikawa v. Dulles, supra, apparently adopted the reasoning of the Lehmann and Correia cases. In Nishikawa, it will be recalled, the Court ruled that a showing by the citizenship-claimant of conscription into a foreign armed force adequately

injected the issue of voluntariness into the case, and required the Government to prove that such military service was voluntary by "clear, convincing and unequivocal evidence". Evidence that the citizenship-claimant had gone to the country of his dual nationality at a time when he was subject to conscription there was not sufficient for the Government to meet its burden of proof.

While in one sense United States citizens who emigrate to Israel, knowing that they will be called upon to serve in that country's armed forces, might be construed as volunteers (over whom the United States as a nonparticipant in the Middle East conflict should exercise a duty of prevention), the operation of the Law of Return poses a hydra-headed complication. By obtaining Israeli nationality without applying for naturalization, taking an oath of allegiance or renouncing United States nationality, the individual acquires obligations to the State of Israel while he retains obligations to the United States, and the body of doctrine relating to the obligations of dual nationals comes into effect. The dual national may well have gone to Israel for the express purpose of serving in its armed forces and be in actuality a volunteer from a nonparticipant country, but when he obtains dual nationality with its concomitant obligations, the United States can only suffer the consequences of his conduct because of its present inability to divest him of its nationality. The case

of the dual national is distinct from that of the ordinary volunteer who does not acquire the nationality of the State in whose armed forces he serves. This fact may not have been sufficiently appreciated by Arab governments and organizations.

United States citizens who are dual nationals, therefore, avoid the effects of Section 349(a)(3) when conscripted into the armed forces of their other nationality. In an era such as the present, when conscription rather than enlistment is the primary means of raising military forces throughout the world, such an exemption is at odds with the uniform administration of Section 349(a)(3), and with the very language of the statute which encompasses both "entering" and "serving in" the armed forces of a foreign State. While there may be some justification for extending the benefit of the doubt regarding voluntariness to young men of dual nationality who have been living abroad with their families during minority, who by reason of financial or familial dependency have been unable to take up residence in the United States, and who have been drafted by the country of their dual nationality while they are minors, there would appear to be no such merit in extending an exemption to persons who have attained legal adulthood and who have continued to reside permanently abroad knowing that they are subject to draft in the country of their residence. Even less is there merit in extending an exemption

to individuals who go abroad and intentionally acquire an additional nationality, knowing that they also acquire thereby the obligations of citizenship -- including military service.

VIII A Suggested Approach for the United States Toward Deprivation of Nationality for Unauthorized Service in Foreign Armed Forces

A. Future Constitutional Challenges to Section 349(a)(3)

Section 349(a)(3) of the Immigration and Nationality Act of 1952 was not held to be unconstitutional by Afroyim v. Rusk. Its constitutional basis has been significantly eroded, however, by the sweeping language of Afroyim which denied the power of Congress to legislate the loss of nationality of any unwilling United States citizen. Nevertheless, any extension of the principles of Afroyim to Section 349(a)(3) to negate its enforcement construes the Supreme Court's decision as an advisory opinion with respect to an act of Congress; the Court has historically held such advisory opinions as beyond its power in deciding actual 'cases and controversies'.

> "If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within limits of judicial power, and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, -- a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning."[234]

Section 349(a)(3) should be fully enforced until such time as an actual case before the Supreme Court given rise to a holding that it is unconstitutional.[235] It should be

remembered that the views expressed by the majority in Afroyim prevailed only by a narrow margin. Changes in the composition of the Court which have occurred since Afroyim was decided may well result in an upset of the balance of opinion and a return to the principles enunciated in Perez v. Brownell, which have a respected heritage of prior judicial acceptance.

The Supreme Court will have an occasion in the near future to rule once again on the unintended loss of United States nationality in the case of Bellei v. Rusk.[236] In this case, the citizenship-claimant, Bellei, obtained United States citizenship by virtue of Section 301(a)(7) of the Immigration and Nationality Act of 1952,[237] which extends citizenship to children born abroad of parents at least one of whom is a United States citizen. Section 301(b) of the Act[238] limits the grant of citizenship by making its retention conditional upon the individual's completion of a period of five years continuous physical presence in the United States between the ages of fourteen and twenty-eight. Bellei was born in Italy of an Italian father and an American mother. From childhood he had been regarded as a United States citizen by the Government; he entered the United States on visits without a visa, obtained a United States passport and registered for the draft. After various extensions of his passport and warnings about the effect of Section 301(b), Bellei

failed to take up residence in the United States prior to his twenty-fourth birthday, and the Department of State concluded that he had lost his United States citizenship. On the basis of the decisions in Schneider v. Rusk, supra, and Afroyim v. Rusk, supra, a three-judge District Court held that Congress may not grant citizenship and then qualify the grant by "... creating a second class citizenship or terminating the grant."[239]

The Court stated:

> "In Afroyim the Court overruled Perez, discarded the case-by-case approach, and sounded a general theme that was contrary to the previously stated assumption that Congress had the power to expatriate citizens in certain circumstances."[240]

While voicing appreciation of the Government's argument that Section 301(b) was intended to assure that, "...children of mixed allegiance have some connection to the state that is offering them its protection and other benefits of citizenship.",[241] the Court nonetheless concluded that:

> "The broad teaching of Afroyim and Schneider is that once American citizenship has been recognized or conferred, Congress may not remove the status: it is for the citizen to abandon his citizenship voluntarily."[242]

The case was argued before the Supreme Court on 15 January 1970 on appeal by the United States; no decision was rendered

by the Court, and the case was restored to the calendar for reargument in the 1965 Fall Term. While the question presented for decision on appeal concerns the power of Congress to attach a condition subsequent to a grant of citizenship, it is evident that the issue is essentially the same as that presented in Afroyim -- i.e., whether or not Congress has the power to deprive an unwilling citizen of his citizenship.[243]

Should a constitutional test of Section 349(a)(3) result in a rejection of the reasoning in Afroyim and a return to the position that Congress does have power to expatriate unwilling citizens, the statutory provision may still be subject to other constitutional challenges. Once the threshhold issue of the existence of Congressional power to legislate expatriation is affirmatively re-established, the statute must withstand the challenge that it constitutes a punishment. As discussed above, in Kennedy v. Mendoza-Martinez, supra, Mr. Justice Goldberg, speaking for a five man majority composed of Chief Justice Warren and Justices Black, Douglas and Brennan, in addition to himself, held that expatriation under Section 349(a)(10) for departing or remaining outside the jurisdiction of the United States in wartime or in time of national emergency for the purposes of avoiding or evading military training and service was a punitive measure which was unconstitutional in that it failed to provide the procedural safeguards of due process guaranteed by the Fifth

and Sixth Amendments. Only three members of that five man majority remain on the Supreme Court today, and it is indeed possible that the view of the dissenting Justices in Mendoza-Martinez will prevail in a future test. Their view would hold that denationalization is within the plenitude of Congress' regulatory powers and that it is not a penal sanction. It is certainly a sustainable contention that expatriation for certain uncoerced acts committed by citizens abroad is not a "punishment" in the constitutional sense, requiring compliance with the procedural safeguards of the Fifth and Sixth Amendments, where the individual is not accused of a crime, subjected to a criminal prosecution or to the deprivation of his life, liberty or property. Loss of nationality for unauthorized foreign military service certainly falls within this category since Federal law does not make such conduct criminal. In Mendoza-Martinez, the conduct giving rise to denationalization was also a criminal offense, and the two cases are thus distinguishable.

If expatriation for unauthorized service in foreign armed forces is held to be not punitive, the additional constitutional challenge of punishment which is cruel and unusual because of the possibility of statelessness does not arise. The plurality opinion in Trop v. Dulles, supra, which held that the creation of a statelessness was a cruel and unusual punishment in violation of the Eighth Amendment, may be

distinguished on the basis that expatriation in that case was imposed as an additional penalty for conviction by courts-martial for desertion from the armed forces in time of war. There expatriation was clearly utilized as a punishment.

In a case where denationalization is held to be punitive, and compliance with the procedural safeguards of the Fifth and Sixth Amendments has been initially determined, it is possible, of course, that the Supreme Court could follow Trop and characterize denationalization as a cruel and unusual punishment constitutionally prohibited by the Eighth Amendment. It is submitted, however, that such a characterization is not valid.

Denationalization with resultant statelessness does indeed carry with it serious consequences for an individual, but such consequences are not necessarily cruel and unusual punishment simply because they are serious. Furthermore, it is not likely that an individual who is deprived of his United States citizenship, and who is rendered stateless thereby, will be left to wander aimlessly and alone throughout the world. An examination of those subsections of Section 349(a) which have not yet been declared unconstitutional reveals that in each instance the conduct which gives rise to expatriation reflects an existing attachment by the individual to a foreign State. To a greater or lesser degree in each case, the individual has sought to identify himself with another country and

has been so accepted by that country. The provisions prescribing loss of nationality serve only to give legal effect to what is already a sociological reality.

B. An Approach to Deprivation of Nationality for the Future

One conclusion of this study is that legislative expatriation of an unwilling citizen should be upheld in some instances.

Certainly, under international law deprivation of nationality by a unilateral act of State, even when it results in statelessness, is permissible. Denationalization resulting in statelessness was specifically recognized as a permissible consequence for certain individual conduct in the proposed United Nations Convention on the Reduction of Statelessness.

As considered previously, Article 15 of the Universal Declaration of Human Rights, which recognizes the right of "everyone" to have a nationality, nonetheless acknowledges the power of a State to withdraw its nationality by a unilateral act. In setting a standard of achievement for nations on the basis of human rights to which national decision-makers are obliged to look for guidance, Article 15 requires only that such deprivation of nationality not be "arbitrary".

The Constitutional prohibition of the unintentional loss of United States nationality is not at all as clear as the formulators of that "absolute view" insist. The historical basis on which it has been predicated has been largely refuted by Justice Harlan's dissenting opinion in Afroyim and elsewhere. As has been demonstrated, it is certainly not a view which has commanded unanimous judicial adherence. As stated by Maxey in his appraisal of Chief Justice Warren's dissenting opinion in Perez:

> "There is nothing irresistibly compelling in the Chief Justice's thesis that the people, because they are sovereign, cannot be deprived of their citizenship. The 'sovereignty of the people' may be a fine oratorical flourish, but it is rather dubious constitutional doctrine. Nor does the authority mustered by the Chief Justice in support of his contention that Congress is without power to take away citizenship withstand close scrutiny."[244]

Previous appraisals of the constitutionality of various statutory provisions prescribing loss of United States nationality have tended to focus on whether the individual's expatriating conduct indicated a 'voluntary relinquishment' of citizenship. As pointed out by Mr. Justice Harlan in his Afroyim dissent, this phrase is susceptible of a twofold interpretation; it may refer to the logical inference to be drawn from actions which are performed without duress, or it may refer only to actions committed with the intention of

effectuating loss of citizenship. It has in fact been used in both senses, and its continued use does not contribute to clarity of analysis. The Attorney General's Opinion analyzed previously, and reprinted in Appendix A of this study, utilizes the phrase and thus has this defect.

The conceptual difficulty posed by the phrase "voluntary relinquishment" is revealed in a recent law review article attempting to define the term.[245] In an effort to give "voluntary relinquishment" a substantive definition, the author states:

> "A citizen should be held to have 'voluntarily relinquished' his American citizenship only if he voluntarily and formally renounces that citizenship in a manner prescribed by law, or if he voluntarily and intentionally acquires a foreign nationality. If he is a dual national, he should be held to have relinquished his citizenship only if he voluntarily commits a hostile act for the state of his other nationality and knows the act is inconsistent with the obligations of his American citizenship."[246]

Laying aside for a moment the possible ambiguities of a test consisting of a "voluntary and formal renunciation of citizenship in a manner prescribed by law", the author had stated earlier in his appraisal that:

> "In the case of a non-dual national, i.e., a citizen only of the United States, any definition of 'voluntary relinquishment' that embraces conduct short of acquiring a foreign nationality seems unnecessarily and unfairly broad."[247]

Thus, the author would seem to permit a voluntary and formal renunciation without the intentional acquisition of a foreign nationality, an outcome which he had already characterized as "unnecessary" and "unfair". That his voluntary and formal renunciation is not confined to a written instrument expressing intent, but also "embraces conduct' (thus eliminating a possible distinction between the two characterizations) can be seen in another of the author's comments:

> "Intention to relinquish citizenship must be either express or inferred from the voluntary act."[248]

It is readily apparent that an intent to relinquish citizenship may be "inferred" from a variety of "voluntary act"[g] established by Congress as criteria for expatriation, and that these acts may be construed as falling within the author's test of a voluntary and formal renunciation of citizenship in a manner prescribed by law. The broadness of this latter test renders it unworkably ambiguous. In addition, it is precisely this "inferrence" which the Afroyim case held could not be drawn. Essentially Afroyim held that Congress had not the power to provide that a citizen's conduct could give rise to an inference "voluntary relinquishment"; "voluntary relinquishment" under Afroyim means intentional relinquishment and that intention must be express. The circumlocutory pitfalls of "voluntary relinquishment" cloud any analysis which uses it as a test.

The test of "express renunciation" of nationality was propounded by Boudin prior to Afroyim as the only constitutionally permissible standard. In his article, Involuntary Loss of American Nationality,[249] Boudin denied the legitimacy of the historical basis for Congress' denationalization authority. While the language of the Afroyim majority opinion considerably confuses the matter by referring to "voluntary relinquishment", it is evident from the opinion as a whole that the Court adopted Boudin's "express renunciation" test. Boudin indicated that Congress could make certain undesirable conduct by a citizen abroad a criminal offense, and by so doing give notice to the world that we desire to avoid embroilment in the internal affairs of other nations; he concluded that the "... drama /of denationalization/ is surely not a requisite to international amity."[250]

Such a conclusion is another "fine oratorical flourish";[251] and it may be the solution which the United States is forced to adopt if the Supreme Court pursues the Afroyim rationale and further narrows Congressional power to denationalize an unwilling citizen. It is well established in constitutional law that Congress does have power to enact laws regulating the conduct of citizens while they are beyond the limits of the territorial jurisdiction of the United States.[252] As stated by Oppenheim-Lauterpacht:

> "The Law of Nations does not prevent a State from exercising jurisdiction over

"its subject travelling abroad, since they remain under its personal supremacy."[253]

However, making certain conduct abroad a criminal offense is not a solution which reaches the problem of the citizen who avoids criminal sanctions by remaining outside the jurisdiction of the United States courts while continuing to flout the law of his country.

The present controversy with Arab nations over the service of United States citizens in the armed forces of Israel presents a clear example of the need for the power of a sovereign nation to declare certain acts of its citizens abroad to be expatriative. As was stated in the majority opinion in Perez v. Brownell, supra, there is a "critical connection" between certain conduct abroad and the possession of American citizenship by the person committing the act which makes such conduct potentially embarrassing to the United States, and "pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem."[254]

In enacting the various subsections of Section 349(a) of the Immigration and Nationality Act, Congress has identified conduct which, insofar as it is not criminal, is at least a diminution of undivided allegiance to the United States. Congress, as the collective will of this nation's citizenry, has determined that such conduct in diminution of

allegiance shall result in the severance of the tie of nationality with the individual actor. (Certainly, the individual's conduct must be uncoerced for that result to occur.) The Supreme Court's constitutional prohibition of the power of Congress to expatriate an unwilling citizen subordinates that legislative will, at best, on uncertain grounds. As stated by Mr. Justice Harlan:

> "The construction now placed on the Citizenship Clause rests, in the last analysis, simply on the Court's ipse dixit, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power."[255]

The emasculation of the expatriation power, and the general uncertainty in the administration of the loss of nationality laws, which the overly subjective test of intent in the Afroyim case has created, can be observed in the interpretive guidelines agreed upon by the Department of State and the Immigration and Naturalization Service following the issuance of the Attorney General's Opinion. These instructions, containing general principles and procedures, were transmitted to diplomatic and consular posts abroad on 16 May 1969 for use in the processing of statutory expatriation cases.[256] As stated in a recent article by Mr. D. E. Duvall, an Attorney for the United States Passport Office:

> "Under the State-Justice guidelines the voluntary performance of the following

> "acts is considered highly persuasive evidence of an intention to relinquish citizenship and will normally result in expatriation absent countervailing evidence of an intent not to transfer or abandon allegiance to the United States: naturalization in a foreign state: a meaningful oath of allegiance to a foreign state; service in the armed forces of a foreign state engaged in hostilities against the United States: or service in an important political post under a foreign government. Other voluntary acts under the remaining statutory expatriative provisions normally will not result in expatriation unless the record in the particular case contains persuasive evidence of an intent by the citizen to transfer his allegiance to a foreign state or abandon his allegiance to the United States."[257]

Thus, in any proceeding to examine whether an individual has lost his United States nationality under the statute, the Government has the burden of establishing by a preponderance of the evidence,[258] that (1) the alleged expatriating act was committed voluntarily, i.e. without duress, (if the lack of voluntariness has been raised by the citizenship-claimant) and that (2) the citizenship-claimant intended to effect the loss of his United States citizenship in committing the expatriating act. Where the Government fails to meet its burden of establishing voluntariness, the inquiry ends in favor of the retention of nationality. the question of intent is no longer relevant.

If his case of lack of voluntariness is uncertain, the citizenship-claimant need not rely on prevailing on that

issue, but may fall back upon the Government's burden of establishing his subjective intent. It is obvious, that absent an express declaration of intent, any human conduct may be rendered ambiguous by the actor's claim that he did not intend the natural and probable inference to be drawn from it. When the individual is free to interpose his subjective intent as a bar, the Government's burden is virtually an impossible one. This can be seen in the Justice-State guidelines for establishing loss of nationality for unauthorized foreign armed services.

> "Under the guidelines, expatriation under that provision [Section 349 (a)(3)] can occur in only two ways. One, when the service is in the armed forces of a foreign state engaged in hostilities against the United States and the record contains no persuasive evidence that the person intended not to transfer his allegiance to the foreign state or to abandon his allegiance to the United States; and two, when the service in the armed forces of a state not engaged in hostilities against the United States and the record contains persuasive evidence of intent to transfer allegiance to the foreign state or to abandon allegiance to the United States."[259]

Under these standards, a citizen would be free to join an enemy armed force engaged in open hostilities against the United States, and then to claim at a later date that he did not intend his conduct to be expatriative, that he was always loyal to the United States and (possibly) that he fought against the United States only because he disagreed with a

particular governmental policy. That such a result could be obtained is nothing short of preposterous, and yet clearly it could be obtained under the present guidelines, particularly in view of the liberal standard of persuasive evidence which the citizenship-claimant needs to present.[260] It should not be forgotten in considering such a result that when the subjective element of intent becomes relevant to the inquiry, voluntariness of conduct has already been established.

The potential impact of the Afroyim case upon United States foreign relations is substantial.[261] United States citizens, native born and naturalized, may live abroad for extended periods of time and cease to participate as citizens in the normal community processes of this country. This freedom to travel and to reside where one chooses is essential in any open and democratic society; but since Afroyim, the way is now clear for United States citizens to participate actively in the internal affairs of a foreign State -- they may obtain a foreign nationality, take an oath of allegiance, serve in the armed forces, hold a political or appointive office and vote in a political election -- as long as they present "persuasive evidence" that they did not intend to lose their citizenship thereby. An open and democratic society may have to bear the loss of the contributions of its citizens living abroad, but it can and should demand that those citizens

refrain from involvement in foreign internal affairs. In an era of sensitive international relationships, where the attitudes of segments of a nation's population are studied by foreign governments in the process of determining their own policies, the United States requires the undivided allegiance of all its citizens. United States citizenship is indeed a precious heritage which should not be lightly lost, but it is not too much to expect that citizens abroad will evince by their conduct that they truly do have such a regard for it.

In a future test, the Supreme Court should return to the reasoning of the Perez case and uphold the power of Congress to denationalize an unwilling citizen as a necessary and proper means to effectuate the Federal power to regulate foreign affairs. Certainly the expatriative conduct must bear a rational nexus to the specific Congressional regulatory power. The conduct sanctioned with loss of nationality must impede or impair the exercise of that power. Further, Congress cannot act capriciously or harshly by making any disfavored conduct expatriative. The conduct in question must represent a diminution of the individual's undivided allegiance to the United States. Such conduct may include an express intention to renounce citizenship or conduct from which diminution of an individual's undivided allegiance may be inferred.

The Court should abandon its test of "voluntary relinquishment", in view of the uncertain meaning of that phrase, and should focus instead on whether the individual has been genuinely coerced in his commission of the expatrative act. Where coercion exists it is not suggested that expatriation should result. Where there is no coercion the individual brings the consequences of his conduct upon himself; loss of nationality is not imposed upon him by the fiat of an oppressive government.

Unauthorized service in the armed forces of a foreign State meets the above proposed constitutional criteria for expatriative conduct. A rational nexus between unauthorized foreign military service and the power to regulate foreign affairs exists in the very substantial possibility that such service may draw the United States into conflicts in which it desires to remain a nonparticipant. That such service is, at a minimum, productive of international discord has been demonstrated. Also, individuals serving in armed forces abroad may be aiding the advancement of international policies contrary to the aims and interests of the United States. Further, the power to denationalize for unauthorized foreign military service permits the United States to exercise more effectively a nonparticipant's duty of prevention in restricting a belligerent's access to its human resources. Such a restriction is in keeping with the development of more stringent

concepts of neutrality in customary international law, which are, in turn, reflective of the greater degree of regulation actually practiced by a State with respect to its citizenry in the latter part of the twentieth century.

An individual's act of entering or serving in the armed forces of a foreign State without authorization certainly constitutes a diminution of allegiance to the United States since he must also bear a loyalty to the country in whose armed forces he serves. Furthermore, during his foreign military service, the individual is unavailable to honor his obligation of service to the United States. Dual nationals, who by their very status bear divided loyalties, should not avoid the consequences of unauthorized foreign military service because of conscription. When they have willingly acquired an additional nationality, or, after obtaining majority, they have remained in the country of their other nationality knowing that they are subject to a military draft, conscripted armed service should not be regarded as coerced. Loss of United States nationality by dual nationals in these instances merely evidences the sociological reality of their attachment to a foreign country, and certainly is not objectionable because of resultant statelessness.

The admittedly distasteful aspect of resultant statelessness, and the contest over whether statelessness is a cruel

and unusual punishment, could be eliminated by a restoration of the provisions of the Nationality Act of 1940, which made loss of nationality for unauthorized foreign armed service contingent upon the acquisition of the nationality of the foreign country.[262] Such a change in the Immigration and Nationality Act of 1952 was recommended by the President's Commission on Immigration and Naturalisation in 1953: however, it was recommended for reasons other than avoidance of the constitutional challenge.[263]

A reversion to the provisions of the 1940 Act would eliminate the consequence of statelessness, but it would not solve the problem of avoiding United States' embroilment in international controversy over the unauthorized service of her citizens in the armed forces of a foreign country. The way would still be clear for United States citizens to serve in foreign military forces, as long as they did not acquire the particular foreign nationality. The possible prejudice to United States' foreign relations would continue to exist. To permit such an exception to the rule would also undermine the rational nexus between the expatriating conduct and the regulatory power of Congress.

It is true that American history from Revolutionary times is replete with examples such as Lafayette, Kosciusko and von Steuben, all of whom were foreigners serving in the armed forces of a nation other than their own. In addition,

American citizens have frequently been motivated to serve in foreign armed conflicts, such as the Spanish Civil War and World War II prior the United States' entrance. Such a history may be said to constitute a tradition of respect in the United States of a citizen's freedom to fight for a cause abroad. However, no matter how nobly or adventurously inspired, such inclinations cannot be held to prevail over the political realities that the actions of a country's citizens may be construed as an expression of national policy, or at a minimum -- of national sentiment, and that such an expression can result in serious and undesirable repercussions in foreign relations. The interests of an entire nation may not be put in jeopardy by the actions of a select few of its citizens pursuing their personal ends.

Sufficient leeway is accorded those who wish to espouse foreign causes through service in foreign military forces by the terms of Section 349(a)(3) itself. If the individual citizen first obtains the permission of the Secretary of State and Secretary of Defense, his service in a foreign armed force will be with impunity as far as the loss of his citizenship is concerned. This element of regulation permits a review of the prospective foreign military service in terms of its consequences with respect to United States' policy. If conflict or embarrassment for the United States is not foreseen, the individual may be permitted to satisfy his personal goals

abroad. Where conflict or embarrassment may exist, this privilege must be denied. In view of the intricacies of United States foreign relations and the potential for mischief which foreign military service creates, it should not be expected, as a practical matter, that this permission will be frequently granted.

In the final analysis, it is necessary for the coordinate branches of the United States Government to begin to speak with one clear voice with respect to loss of United States nationality if it is ever to maintain any semblance of credibility on the subject. A reaffirmation by the Supreme Court of the Congressional power to expatriate in certain instances, as suggested above, and an abandonment of the test of "voluntary relinquishment" in favor of a test of "uncoerced conduct", would hopefully provide the Executive branch with guidance in enforcing the law, and permit the disharmonious voices of the Federal Government to sound in concert.

Footnotes

1. 8 Whiteman, Digest of International Law 1 (1967). See also, prior U.S. digests of international law cited in 8 Whiteman, loc. cit.

2. Nottebohm Case (Liechtenstein v. Guatemala) (second phase), Judgment of April 6, 1955: I.C.J. Reports 1955, 4.

3. 170 LNTS 89; 5 Hudson, International Legislation 329 (1936).

4. 1 International Law (Lauterpacht, 7th. ed.), 1948, p.645.

5. Weis, Nationality and Statelessness in International Law (1956) at 65.

6. "Nationality is a subject primarily of municipal as distinguished from international law. The fact that the matter is largely controlled by municipal law frequently give rise to conflicts between the laws of different countries and results in many cases of dual nationality. For example, a person born in a country may have the nationality of that country by reason of birth therein and at the same time have the nationality of another country by reason of the fact that his parents are nationals of such other country; or a person, although acquiring a new nationality through naturalization, may not lose his former nationality. Many countries, particularly European countries, refuse to recognize the right of their nationals to expatriate themselves by naturalization except under certain conditions." III Hackworth, Digest of International Law (1942) 1-2.

"As between the individual and a state the question whether he is or is not a national is a matter of the internal law of the state. But the question whether or not an individual possesses a certain nationality may easily be raised between states and for the settlement of such a controversy an appeal to municipal law may not be decisive." Williams, "Denationalization", VIII B.Y.I.L. (1927) 45, 50 (quoted in 8 Whiteman, op.cit. at 1).

See also, Nationality Decrees Issued in Tunis and Morocco (French Zone), P.C.I.J., Adv. Op. No. 4, Series B, Feb. 7, 1923.

7. Weis, on. cit. at 242.

8. Hellison, The Zionist-Israel Juridical Claims to Constitute "The Jewish People" Nationality Entity and to Confer Membership in It: Appraisal in Public International Law, 32 Geo. Wash. L. Rev. 903 (1964).

9. Weis, on.cit. at 3. Also quoted in 8 Whiteman, on.cit. at 2.

10. Raymond H. Anderson, The New York Times, Vol. CXIX, 9 November 1969, p. 10.

11. UPI, The Evening Star, No. 312, Washington, D.C., pp. A-1 and A-3.

12. Id., p. A-1.

13. 387 U.S. 253, 87 S.Ct. 1660 (1967).

14. 24 UN GAOR Doc. A/7717 - S/9479; 42 Op. Att'y.Gen., No.34 (1969).

15. The same provision was reenacted as Section 349(a)(5) of the Immigration and Nationality Act of 27 June 1952, c.477, 66 Stat. 267, 8 U.S.C. §1401 (a)(5). The latter provision would also, therefore, suffer the condemnation set forth in Afroyim.

16. See Note 14, supra.

17. McDougal and Feliciano, Law and Minimum World Public Order, The Legal Regulation of International Coercion (New Haven and London: Yale University Press, 1961), passim.

18. 8 U.S.C. §1482.

19. 8 U.S.C. §1487(a)(3).

20. 8 U.S.C. §1401(a)(5). This section is a re-enactment of §401(e) of the Nationality Act of 1940, which was the statutory provision disapproved in Afroyim.

21. Debate occurred on April 23-25 and June 10, 1952 in the House of Representatives and on May 7-22 and June 11, 1952 in the Senate.

22. 98 Cong. Rec. 5160 (1952) (remarks of Senator Humphrey).

23. H.R.Rep. No. 1365, 82nd Cong., 2nd Sess. (1952).

24. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd. Cong., 1st. Sess., on S.716, H.R.2379 and H.R.2816, Bills to Revise the Laws Relating to Immigration, Naturalization and Nationality, U.S. 82nd. Congress, Hearings, Lib. of Congress Vol.142, 708-710.

25. 8 U.S.C. §1438.

26. See Note 24, Hearings at 101.

27. Id.

28. Id. at 112.

29. Id., 711-722

30. Id., 280-289

31. Id.

32. "No other country in the world has as many enumerated grounds for expatriation as the United States. With the exception of Russia and its iron-curtain satellites, no other country seeks to take away citizenship as arbitrarily as we do. Most countries of the world seek to preserve citizenship instead of taking it away. During the last 10 years we have expatriated over 30,000 citizens, not because they were disloyal, but because of some unwitting act on their part, such as remaining outside the United States during the war years when transportation back to the United States was difficult or impossible and when we had no consuls established abroad. Close to 4,000 people have lost their American citizenship by voting in Italy. And it was our Government that urged them to vote so that the Communists would not obtain control of Italy.

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"We also believe that only voting in national foreign elections should expatriate and that voting under mistake, duress, or any other undue influence, whether it consist of moral pressure or other type of undue pressures, should not result in expatriation.

A thorough study of our expatriation laws should be undertaken. The history of our expatriation laws should be studied, as well as those of other countries. We submit that such a study will reveal that we have gone too far in expatriating our citizens, that we are too arbitrary, and that we provide for the loss of citizenship where individuals perform acts abroad which are not inconsistent with continued allegiance

32. cont'd. 'to the United States. We submit that there is need to thoroughly revise our expatriation laws to liberalize them in favor of retaining citizenship and not, as is here proposed, to expand the class of persons who are either stateless or expatriates.

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"In its present form the bill has completely disregarded constitutional restrictions upon deportation, denaturalization, and expatriation. If all possible constitutional objectives are not carefully heeded, then, years after the enactment of the bill, an alien or citizen may be able to influence the Supreme Court of the validity of such objections, with the result that thousands of proceedings will be void. The havoc and confusion which resulted when the Supreme Court voided 8,000 deportation hearings in the Bong case will again be repeated. This does not make for orderly and efficient administration of our immigration and nationality laws.' Id. at 682-683.

33. 50 U.S.C. App. 6[illegible].

34. See Section 20[illegible] of the Immigration and Nationality Act of 1952, 8 U.S.C. §12[illegible].

35. "The terms citizenship and nationality refer to the status of the individual in his relationship to the state and are often used synonymously. The word nationality, however, has a broader meaning than the word citizenship. Likewise the terms citizen and national are frequently used interchangeably. But here again the latter term is broader in its scope than the former. The term citizen, in its general acceptation, is applicable only to a person who is endowed with full political and civil rights in the body politic of the state. The term national includes a citizen as well as a person who, though not a citizen, owes permanent allegiance to the state and is entitled to its protection, as, for example, natives of certain of the outlying possessions of the United States. It also includes legal entities such as corporations. Certain classes of persons are described as 'nationals, but not citizens' by section 20[illegible] of the Nationality Act of 19[illegible]0 (5[illegible] Stat. 113[illegible])." III Hackworth, Digest of International Law (19[illegible]2) 1-2.

36. See Afroyim v. Rusk, 250 F.Supp. 686 and Afroyim v. Rusk, 361 F.2d 102.

37. Afroyim v. Rusk, supra at 255, 87 S.Ct. at 1561.

38. Id. at 255, 87 S.Ct. at 1661.

39. Id. at 257, 87 S.Ct. at 1662.

40. Id. at 263, 87 S.Ct. at 1665.

41. Id. at 268, 87 S.Ct. at 1668.

42. 356 U.S. 44, 78 S.Ct. 568 (1958).

43. 387 U.S. at 269, 87 S.Ct. at 1669.

44. Id. at 257, 87 S.Ct. at 1662.

45. Id. at 267, 87 S.Ct. at 1667.

46. 356 U.S. at 68-69, 78 S.Ct. at 581.

47. Id. at 70, 78 S.Ct. at 586.

48. 387 U.S. at 268, 87 S.Ct. at 1668 (emphasis supplied).

49. Id. at 269 ftn.1, 87 S.Ct. at 1668-1669 ftn.1.

50. Scott v. Sanford, 19 How. 393 (1856) The case held that Negroes, whether emancipated or not, were not citizens of the United States and were not entitled to any of the privileges and immunities conferred by the Constitution upon citizens of the United States. The Supreme Court further held that no state by any act of its own, passed since the adoption of the Constitution, could make a person a citizen of the United States by conferring state citizenship upon him.

51. 387 U.S. at 254, 87 S.Ct. at 1676.

52. 9 Wheat. 738, 6 L.Ed. 204 (1824).

53. 169 U.S. 649, 18 S.Ct. 456 (1898).

54. 9 Wheat. at 827. Quoted in Ifrorin v. Rush, 387 U.S. at 261, 87 S.Ct. at 1664-1665.

55. 387 U.S. at 266-267, 87 S.Ct. at 1667.

56. In discussing these dicta, Mr. Justice Harlan stated: "The last piece of evidence upon which the Court relies for this period is a brief obiter dictum from the lengthy opinion for the Court in Osborn v. Bank of the United States, 9 Wheat. 738, 827, 6 L.Ed. 204,

56. cont'd. written by Mr. Chief Justice Marshall. This use of the dictum is entirely unpersuasive, for its terms and context make quite plain that it cannot have been intended to reach the questions presented here. The central issue before the Court in Osborn was the right of the bank to bring its suit for equitable relief in the courts of the United States. In argument, counsel for Osborn had asserted that although the bank had been created by the laws of the United States, it did not necessarily follow that any cause involving the bank had arisen under those laws. Counsel urged by analogy that the naturalization of an alien might as readily be said to confer upon the new citizen a right to bring all his actions in the federal courts. Id., at 813-814, 6 L.Ed. 204. Not surprisingly, the Court rejected the analogy, and remarked that an act of naturalization 'does not proceed to give, to regulate, or to prescribe his capacities,' since the Constitution demands that a naturalized citizen must in all respects stand 'on the footing of a native.' Id., at 827, 6 L.Ed. 204. The Court plainly meant no more than that counsel's analogy is broken by Congress' inability to offer a naturalized citizen rights or capacities which differ in any particular from those given to native-born citizen by birth. Mr. Justice Johnson's discussion of the analogy in dissent confirms the Court's purpose. Id., at 875-876, 6 L.Ed. 204.

Any wider meaning, so as to reach the questions here, wrenches the dictum from its context, and attributes to the Court an observation extraneous even to the analogy before it. Moreover, the construction given to the dictum by the Court today requires the assumption that the Court in Osborn meant to decide an issue which had to that moment scarcely been debated, to which counsel in Osborn had never referred, and upon which no case had ever reached the Court. All this, it must be recalled, is in an area of the law in which the Court had steadfastly avoided unnecessary comment. See e.g. M'Ilvaine v. Coxe's Lessee, 4 Cranch 209, 212-213, 2 L.Ed. 474. By any standard, the dictum cannot provide material assistance to the Court's position in the present case.[17]" Id. at 875-877, 87 S.Ct. at 1672.

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[17]Fn. 17. "Similarly, the Court can obtain little support from its invocation of the dictum from the opinion for the Court in United States v. Wong Kim Ark, 169 U.S. 649, 703, 18 S.Ct. 456, 477, 42 L.Ed. 890. The central issue there was whether a child born of Chinese nationals domiciled in the United

56. (Stn. 12 cont'd.) States is an American citizen of its birth occurs in this country. The dictum upon which the Court relies, which consists essentially of a reiteration of the dictum from Osborn, can therefore scarcely be considered a reasoned consideration of the issues now before the Court. Moreover, the dictum could conceivably be read to hold only that no power to expatriate an unwilling citizen was conferred either by the Naturalization Clause or by the Fourteenth Amendment; if the dictum means no more, it would of course not even reach the holding in Perez. Finally, the dictum must be read in light of the subsequent opinion for the Court, written by Mr. Justice McKenna, in Mackenzie v. Hare, 239 U.S. 299, 36 S.Ct. 106, 60 L.Ed. 297. Despite counsel's invocation of Wong Kim Ark, id., at 302 and 303, 36 S.Ct. 106, the Court held in Mackenzie that marriage between an American citizen and an alien, unaccompanied by any intention of the citizen to renounce her citizenship, nonetheless permitted Congress to withdraw her nationality. It is immaterial for these purposes that Mrs. Mackenzie's citizenship might, under the statute there, have been restored upon termination of the marital relationship; she did not consent to the loss, even temporarily, of her citizenship, and, under the proposition apparently urged by the Court today, it can therefore scarcely matter that her expatriation was subject to some condition subsequent. It seems that neither Mr. Justice McKenna, who became a member of the Court after the argument but before the decision of Wong Kim Ark, supra, 169 U.S., at 732, 18 S.Ct., at 460 nor Mr. Chief Justice White, who joined the Court's opinions in both Wong Kim Ark and Mackenzie, thought that Wong Kim Ark required the result reached by the Court today. Nor, it must be supposed, did the other six members of the Court who joined Mackenzie, despite Wong Kim Ark." Id. at 277-278, 87 S.Ct. at 1672-1673.

57. Id. at 292-293, 87 S.Ct. at 1680-1681.

58. 356 U.S. at 59, 78 S.Ct. at 576.

59. Id. at 60-61, 78 S.Ct. at 577.

60. Id. at 61, 78 S.Ct. at 577.

61. 239 U.S. 299, 36 S.Ct. 106 (1915).

62. 338 U.S. 451, 70 S.Ct. 292 (1950).

63. 356 U.S. at 61-62, 78 S.Ct. at 577-578.

64. 356 U.S. at 60, 78 S.Ct. at 587.

65. 307 U.S. 325, 59 S.Ct. 884 (1939).

66. Id. at 329, 59 S.Ct. at 887.

67. Id. at 334, 59 S.Ct. at 889.

68. 356 U.S. 86, 78 S.Ct. 590 (1958).

69. 8 U.S.C. §1481(a)(8).

70. 356 U.S. 129, 78 S.Ct. 612 (1958).

71. Immigration and Nationality Act of 1952, Section 349(a)(3); 8 U.S.C. §1481(a)(3).

72. 356 U.S. at 136-137, 78 S.Ct. at 617.

73. Id. at 138, 78 S.Ct. at 618.

74. Id. at 141, 78 S.Ct. at 619.

75. Id. at 144, 78 S.Ct. at 621.

76. 372 U.S. 144, 83 S.Ct. 554 (1963)

77. 8 U.S.C. §1481(a)(10).

78. 377 U.S. 163, 84 S.Ct. 1187 (1964)

79. 8 U.S.C. §1484(a).

80. See, Gordon, The Citizen and the State: Power of Congress to Expatriate American Citizens, 53 Georgetown Law Journal, 315, 332 (1965).

81. 377 U.S. 214, 84 S.Ct. 1224 (1964), rehearing denied: 377 U.S. 1018, 84 S.Ct. 1964 (1964).

82. 8 U.S.C. §1481(a)(3).

83. 315 F.2d 673, 675.

84. 372 U.S. at 187, 83 S.Ct. at 577.

85. Id. at 187, 83 S.Ct. at 577.

86. See, Note 80, op.cit. at 333 et seq.

87. Id. at 333.

88. Id.

89. "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' * * * 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' (citation omitted) The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Mr. Justice Brandeis concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466 (1936) The statement of Justice Brandeis was approved in Elma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 67 S.Ct. 231 (1946) and Hague Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409. See also, Ford v. Alabama, 94 U.S. 645, 24 L.Ed. 302 (1877).

90. Section 349(a)(5) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1481(a)(5).

91. Note 41, supra.

92. 42 Op. Att'y Gen. No. 34 (1969).

93. Id.

94. 8 U.S.C. §1103(a).

95. Note 92, supra. The complete text of the opinion is reproduced as Appendix A.

96. 24 UN GAOR Doc. A/7717 - S/9479.

97. Id. at 1.

98. 24 UN GAOR Doc. A/7714 - S/9477.

99. Note 96, doc.cit. at 1-2.

100. Department of State Press Release No. 337, "Statement by the Department of State on Foreign Military Service by United States Citizens", (11 November 1969). As of 21 July 1970, it does not appear that "additional steps" have been implemented. See Appendices B and C.

101. Muskrat v. United States, 219 U.S. 346, 361, 31 S.Ct. 250, 255 (1911).

102. Supra, p. 27.

103. Weis, op.cit. at 122.

104. Id. at 122-123.

105. Id. at 124-125.

106. [1921] 2 Ch. 67, 82.

107. 137 F.2d 893 (1943).

108. Id. at 903.

109. 169 U.S. 649, 18 Sct. 456 (1898).

110. Id. at 668, 18 Sct. at 464.

111. Weis, op.cit. at 126-127, 129, 166.

112. Id. at 120.

113. Id. at 85.

114. See Note 3, supra.

115. I.e., Protocol Relating to Military Obligations in Certain Cases of Dual Nationality (178 LNTS 227); Protocol Relating to a Certain Case of Statelessness (179 LNTS 115) and Special Protocol Concerning Statelessness (L.N. Doc. C.227 M. 114. 1930. V.) The last cited Protocol has not come into effect because of an insufficient number of ratifications or accessions. (9 obtained, 10 required).

116. See p. 1, supra.

117. L.N. Doc. C.230. M. 115. 1930 V. (A. Nationality).

118. UN Doc. E/600, para. 46; United Nations Yearbook on Human Rights for 1947, Part III, Annex, 541.

119. A Study of Statelessness, UN Pub. No. 1949, XIV, 2.

120. See generally, The Work of the International Law Commission, UN Pub. 67. V. 4, 28-30; Weis, op.cit. 167-171.

121. 9 UN GAOR, Supp. No. 9 (A/2693), Report of the International Law Commission (1954) at 23.

122. Id. at 24.

123. Id. at 26.

124. Id. at 29.

125. Id. at 32.

126. Id. at 33.

127. It will be recollected that loss of nationality for 'desertion' and 'draft evasion' were held unconstitutional in Trop v. Dulles and Kennedy v. Mendoza-Martinez, supra, respectively.

128. Section 349(a)(3) of the 1952 Act.

129. Section 349(a)(5) of the 1952 Act.

130. See 9 UN GAOR, Supp. No. 9 (A/2693), Report of the International Law Commission (1954) 43 (Articles 7, 8 and 9 of both Conventions).

131. See Note 120, above.

132. UN Pub. 67. V. 4, pp. 28-30.

133. Only the United Kingdom and Ovelom have ratified the Convention as of 1 March 1970. UN Pub. U. 67. V. 5, Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions.

134. Article 3, Convention on the Reduction of Statelessness, UN Pub. 67. V. 4 at 138-139.

135. 3 UN GAOR Doc. A/810; Yearbook of the United Nations 1948-1949, 536.

136. Mrs. Franklin D. Roosevelt, United States Representative on the Commission on Human Rights (of which she was also Chairman) and Representative to the General Assembly, stated: "In giving our approval to the Declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations." 19 Dept. of State Bulletin 751 (1948).

137. I Oppenheim, op.cit. (Lauterpacht, 8th.ed.) §13, 13a, 269, pp. 19-22, 636-639.

138. Id., 813a, 289; Reparation for Injuries Suffered in the Service of the United Nations (11 April 1949) I.C.J. Rep. 1949, 174-219.

139. H. Lauterpacht, An International Bill of the Rights of Man (Columbia University Press: New York, 1945)

140. Id. at 126.

141. Id.

142. Id. at 128.

143. The Member States selected to comprise this Committee were: Australia, Chile, China, France, Lebanon, USSR, United Kingdom and United States of America. Report of the Drafting Committee, UN Doc. E/CN. 4/21 (1 July 1947); United Nations Yearbook on Human Rights for 1947, Part III Doc. Annex, 482.

144. United Nations Yearbook on Human Rights for 1947, Part III Doc. Annex, 486.

145. Id. at 495.

146. Id. at 498.

147. Id. at 501.

148. Id., 487-492.

149. Id., 503-505.

150. Id. at 542.

151. United Nations Yearbook on Human Rights for 1948, Part III, 459.

152. Id.

153. Id. at 463.

154. E.g., Article 21, Universal Declaration of Human Rights: "1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right of equal access to public service in his country."

155. 3 UN GAOR, Part I, Third Committee, 21 Sept.-8 Dec. 1948, 348-362.

156. UN Doc. A/C.3/286/Rev.1; 3 UN GAOR, Part I, Third Committee Annex, 25-26.

157. UN Doc. E/800; UN Doc. A/C.3/266/Rev.1; 3 UN GAOR Part I, Third Committee Annex at 25.

158. UN Doc. A/C.3/244; UN Doc. A/C.3/286/Rev.1; 3 UN GAOR, Part I, Third Committee Annex at 25.

159. UN Doc. A/C.3/260; UN Doc. A/C.3/286/Rev.1; 3 UN GAOR Part I, Third Committee Annex at 26.

160. 3 UN GAOR, Part I, Third Committee, 21 Sept. - 8 Dec. 1948 at 350.

161. Id. at 351.

162. Id.

163. Id. at 352-353.

164. Id. at 354.

165. Id. at 355.

166. Id., 359-360.

167. Id., 361-362.

168. 3 UN GAOR, Part I, Plenary Meetings, 852-935.

169. Id. at 932-933; United Nations Yearbook on Human Rights for 1948, Part III, 465-466.

170. 213 UNTS 221 (1955); 1 Yrbk of the European Conventions on Human Rights (1955-1956-1957) 4-36.

171. American Convention on Human Rights, Inter-American Specialized Conference on Human Rights, Doc. 65 (English) Rev.1 Corr. 2.

172. See Note 154, supra. See also, Article 23 of the American Convention on Human Rights, Note 171, supra.

173. Griffin, The Right to a Single Nationality, 40 Temple Law Q. 57, Fall 1966. Griffin predicates his argument on the principles that "nationality as sociological reality is by nature not capable of division between two or more states" and that "conduct of the individual furnishes the only solid juridical foundation for recognition of single nationality."

173. (Cont'd) Id. at 64. The decision as to which State or States would surrender their claims would be made on the basis of an extension of the doctrine of "effective" or "dominant" nationality. In this latter connection, see United States of America ex rel. Florence S. Merge v. Italian Republic, Italian-United States Conciliation Commission (1955), 22 Int'l. Law Rep. 443 (1955); The Canevaro Case (Italy v. Peru), Permanent Court of Arbitration (1912) Scott, Hague Court Reports 284 (1916); and the Nottebohm Case, Note 2, supra.

174. Cf. 'The same purely nominal -- and, in effect, deceptive -- solution /accomodating polarised views/ was adopted in the matter of nationality. After starting, in the first part of Article 15, that 'everyone has the right to a nationality', the Declaration proceeds to lay down that 'no one shall be arbitrarily deprived of his nationality'. The natural implication of the principle that everyone is entitled to a nationality would be the prohibition of deprivation -- whether arbitrary or otherwise -- of nationality in a way resulting in statelessness. None of the states which in the period between the two world wars resorted to deprivation of nationality en masse for political or racial reasons would have admitted that such measures were arbitrary. They were, in their view, dictated by the highest necessities of the state. In a pronouncement claiming primarily moral authority there should have been no room for the institution of statelessness, which is a stigma upon international law and a challenge to human dignity in an international legal system in which nationality is the main link between the individual and international law. There was no inclination to soften the impact of that incongruous contradiction by the adoption of the principle that persons who, because of statelessness, do not enjoy the protection of any government, shall be the concern of the United Nations. A French proposal to that effect was rejected both by the Human Rights Commission and by the Committee of the Committee of the General Assembly." H. Lauterpacht, The Universal Declaration of Human Rights, XXIV B.Y.I.L. (1948) 354 at 374.

175. McNair and Watts, The Legal Effects of War (Cambridge: University Press, 1966); II Oppenheim, op.cit. (Lauterpacht, 7th.ed. 1952) §293, pp.653-654.

176. McNair and Watts, op.cit. at 447.

177. II Oppenheim, op.cit., §293.

178. 59 Stat. 1031, TS 993; 3 Bevans 1153.

179. II Oppenheim, op.cit., §292d. at 647-648.

180. McDougal and Feliciano, op.cit. at 71.

181. II Oppenheim, op.cit., §294 at 654.

182. 1 Schwarzenberger, A Manual of International Law (4th.ed., 1960) at 208

183. Id.

184. II Oppenheim, op.cit., §§349, 350, pp. 738-742.

185. Id., §350.

186. 36 Stat. 2310; TS 540; 1 Bevans 654; II Malloy 2290. Hereinafter referred to as Hague Convention V.

187. 36 Stat. 2415; TS 545; 1 Bevans 723; II Malloy 2352. The United States is a party with reservation and understanding. Hereinafter referred to as Hague Convention XIII.

188. Article 20 of Hague Convention V and Article 20 of Hague Convention XIII.

189. Bishop, International Law, Cases and Materials (2nd.ed., 1962), 862.

190. Treaties in Force (1 Jan. 1970), Dept. of State Pub. 8513, pp. 346, 348.

191. Bishop, loc.cit.

192. "§331. A neutral is not obliged by his duty of impartiality to prohibit passage through his territory of men who intend to enlist, whether they pass singly or in numbers. Thus, in 1870, Switzerland did not object to Frenchmen travelling (through Geneva for the purpose of reaching French corps, or to Germans travelling through Basle for the purpose of reaching German corps, on condition, however, that these men travelled without arms and uniform. On the other hand, when France during the Franco-German War organised an office in Basle for the purpose of sending bodies of Alsatian volunteers through Switzerland to the south of France, Switzerland correctly closed it down because this official organisation of the passage of whole bodies

192. cont'd. 'of volunteers through her neutral territory was more or less equal to a passage of troops.

"The Second Hague Conference sanctioned this distinction, for Article 6 of Convention V. enacts that 'the responsibility of a neutral Power is not involved by the mere fact that persons cross the frontier individually (isolement) in order to offer their services to one of the belligerents.' *A* *argumentum a contrario* justifies the conclusion that the responsibility of a neutral *is* involved in case it allows men to cross the frontier *in a body* in order to enlist in the forces of a belligerent.

'§332. Since the levy and passage of troops, and the forming of corps of combatants, must be prevented by a neutral, *a fortiori* he is required to prevent the organisation of a hostile expedition from his territory against either belligerent. This takes place when a band of men combine under a commander for the purpose of starting from the neutral territory and joining the belligerent forces. The case, however, is different if a number of individuals, not organised into a body under a commander, start in company from a neutral State for the purpose of enlisting with one of the belligerents.'
II Oppenheim, *op.cit.* at 703-704.

193. 5 UN GAOR, *Plenary Meetings*, Vol. I, 589-597; 5 UN GAOR, *First Committee*, Vol. I, 421-453.

194. II Oppenheim, *op.cit.*, §322 at 687.

195. (June 7, 1911) 1911 For.Rel. 494 at 501-502: quoted in VII Hackworth, *op.cit.* (1943) at 410.

196. IV 1940 For.Rel. 677 at 677.

197. June 25, 1940, c.645, 62 Stat. 745.

198. II Oppenheim, *op.cit.*, §322 at 687.

199. McNair and Watts, *op.cit.* at 449-450.

200. *Id.*, 452.

201. *Id.*, 452-453.

202. Brownlie, *Volunteers and the Law of War and Neutrality*, 5 Int'l. and Comp. Law Q. (1956) 570, 575.

203. *Id.* at 574-575.

204. Garcia-Mora, International Law and the Law of Hostile Military Expeditions, 27 Fordham Law Rev. (1958-59) 309, 315.

205. Id., 316; McDougal and Feliciano, op.cit., 438; Brownlie, op.cit., 577-578.

206. McDougal and Feliciano, op.cit. at 439-440.

207. Garcia-Mora, op.cit. at 316.

208. Brownlie, op.cit. at 577.

209. Id.

210. Id., 572-573.

211. McDougal and Feliciano, op.cit., 436.

212. Garcia-Mora, op.cit., 311-312.

213. Id., 331.

214. Id., at 312.

215. Brownlie, op.cit., 579.

216. Id.

217. 3 UN GAOR Doc. A/810; United Nations Yearbook on Human Rights for 1948, Part III, 466.

218. Kent v. Dulles, 357 U.S. 117, 78 S.Ct. 1113 (1958).

219. Law of Return, 5710-1950, 4 Laws of the State of Israel (auth. translation) (hereinafter LSI) 114 (1950), as amended by Law of Return (Amendment) 5714-1954, 8 LSI 144 (1954) and Nationality Law, 5712-1952, 6 LSI 50 (1952).

220. At least one nation, however, has declined to adopt the approach that the absence of a rejection of Israeli nationality is an indication of an affirmative desire to acquire such nationality sufficient to result in the loss of prior nationality. In the Revenna case, the applicant claimed that, nonwithstanding the fact that she had acquired the nationality of Israel by virtue of Article 2 of the Law of Return, she was still entitled to Italian nationality, on the ground that the acquisition by her of

220. Cont'd. the nationality of Israel was not 'spontaneous', as provided by Article 8(1) of the Italian Law of June 13, 1912 establishing criteria for the loss of Italian nationality. The Tribunal of Rome held that the applicant was entitled to a declaration that she remained an Italian citizen on the ground that, although she had "voluntarily" acquired the nationality of Israel, the acquisition of that nationality was not "spontaneous" within the meaning of Article 8(1) of the applicable statute. The court stated:

"Whereas 'voluntary' means any outward manifestation of a person's legally relevant will, though possibly influenced by 'motus ab intrinseco', which is normally immaterial as far as our law is concerned, 'spontaneity' results in the manifestation of a will entirely independent of all external factors.'

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"The legislator did not foresee the case of voluntary acquisition of a foreign nationality where spontaneity is lacking, which cannot constitute a case of loss of Italian nationality. The interpretation, which is in accordance with the letter and spirit of the law, was also adopted by our diplomatic and consular representatives on the spot, who put up a notice at the Consulate in Tel Aviv that failure to make a contrary declaration, as provided by the law of Israel, would not in itself result in the loss of Italian nationality. In this case there can be no doubt that the acquisition of the nationality of Israel by the applicant, though it was voluntary, was certainly not spontaneous.

"The title of the "Law of Return', which applies not to all immigrants but only to the Jewish immigrant who comes to Palestine, is significant in itself. A country which emerges in an atmosphere of passion fanned by the continuous perils to which its existence is exposed, and whose main motive is the return of the sons to the land of their fathers, stresses the religious appeal and shows that any sign of minor opposition to the new State is also regarded as a sign of lack of religious conviction. This in itself implied a psychological interaction which is incompatible with an expression of spontaneity and undoubtedly made it very difficult for the applicant to make an express declaration that she <u>did not desire</u> to become part and parcel of this community to whose faith she belonged and among whose members she lived. The leaders of that community would have regarded her attitude as being opposed more to the religious than the political community. It would have indicated at least a trace of renunciation. Such a situation therefore requires, in application of

220. Cont'd. "the principles enunciated above, that the applicant can and must be considered an Italian citizen, and that her application must be granted in full." Ravenne v. Ministeri Interno, Tesoro e Pubblica Istruzione, (Italy, Tribunal of Rome. 25 February 1958) 26 Int'l Law Rep. 376 (1958 - II).

221. Nationality Law, Part One, para. 5, Note 219, supra.

222. Defense Service Law, 5719-5719 (Consolidated Version), 13, LSI 328.

223. James Feron, The New York Times, Vol CXIX, 23 November 1969, p. L 11.

224. Id.

225. United States of America ex rel. Florence S. Merge v. Italian Republic, Note 173, supra; The Canevaro Case (Italy v. Peru), Note 173, supra; The Mottebohm Case, Note 2, supra.

226. See Note 3, supra.

227. Ber-Yaacov. Dual Nationality (N.Y.: Praeger, 1961) at 265, 268.

228. 3 Cir., 1953, 206 F.2d 592.

229. D.C.R.I. 1955, 133 F.Supp. 442.

230. Id. at 444-445.

231. 3 Cir., 1958, 254 F.2d. 379.

232. Id. at 381.

233. Cafiero v. Kennedy, D.C.N.J. 1966, 262 F. Supp. 140. See also, Coumas v. Brownell, C.A. Cal. 1955, 222 F. 2d. 331; Acheson v. Maenza, C.A. Dist. Col. 1953, 202 F. 2d. 453.

234. Muskrat v. United States, supra at 362, 31 S.Ct. at 256.

235. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." Mr. Justice Holmes speaking in Johnson v. United States, 1 Cir., 1908, 163 F. 30, 32, quoted

235. Cont'd. quoted with approval in F.T.C. v. Jantzen, Inc., 386 U.S. 228, 235, 97 S.Ct. 998, 1002 (1967).

236. U.S.D.C. Dist. Col. 1969, 296 F.Supp. 1247.

237. 8 U.S.C. §1401(a)(7).

238. 8 U.S.C. §1401(b).

239. 296 F.Supp. at 1252.

240. Id. at 1250.

241. Id. at 1252.

242. Id.

243. 38 United States Law Week 3005.

244. Maxey, Loss of Nationality: Individual Choice or Government Fiat?, 26 Albany Law Rev. 151 (1962) at 174-175.

245. Nolson, "Voluntary Relinquishment" of American Citizenship: A Proposed Definition, 53 Cornell Law Rev. 325 (1967-68).

246. Id. at 335-336.

247. Id. at 329.

248. Id. at 328.

249. Boudin, Involuntary Loss of American Nationality, 73 Harvard Law Rev. 1510 (1959-60).

250. Id. at 1527.

251. A borrowing of Maxey's characterization of the Chief Justice's phrase "sovereignty of the people" in Perez v. Brownell, supra.

252. U.S. v. Bowman, 260 U.S. 94, 43 S.Ct. 39 (1922); Blackmer v. U.S., App.D.C., 284 U.S. 421, 52 S.Ct. 252 (1931). See also, 48 C.J.S. International Law §11.

253. I Oppenheim, op.cit. (4th.Ed.) §145, quoted with approval in Blackmer v. U.S., 284 U.S. at 437, 52 S.Ct. at 254.

254. 356 U.S. at 60, 78 S.Ct. at 577.

255. 387 U.S. at 293, 87 S.Ct. at 1681.

256. Duvall, Expatriation Under United States Law, Perez to Afroyim, The Search for a Philosophy of American Citizenship, 56 Virginia Law Rev. 408 (Apr. 1970).

257. Id. at 433-434.

258. Section 349(c) of the Immigration and Nationality Act; 8 U.S.C. §1481(c).

259. Duvall, op.cit. at 443. Mr. Duvall indicates that although the phrase "engaging in hostilities against the United States" has not been administratively or judicially defined, it is "probably" restricted to North Vietnam and North Korea. Hostilities may be short of acts of war but do not extend to the absence of diplomatic relations. Id., 443.

260. Id., 443-445.

261. Id., 453.

262. Nationality Act of 1940, Section 401(c), supra.

263. Report of the President's Commission on Immigration and Naturalization, Whom We Shall Welcome (Washington, D.C.: G.P.O., 1953).

Appendix A

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

Attorney General's Statement of Interpretation Concerning Expatriation of United States Citizens

January 19, 1968.

In Afroyim v. Rusk, 387 U.S. 253 (1967), the Supreme Court held unconstitutional section 401(e) of the Nationality Act of 1940 (Oct. 14, 1940, c. 876, 54 Stat. 1137, 1169), which provided that a citizen of the United States shall lose his citizenship by voting in a foreign political election.[1]

The sweeping language of the Afroyim opinion raises questions as to its effect on the validity of expatriation provisions, other than those relating to voting, in the Immigration and Nationality Act ('the act') or in former law preserved by section 405(c) of the act, 8 U.S.C. 1101, note.[2] These questions are of importance to the Department of State in the administration of the passport laws and to the Immigration and Naturalization Service of the Department of Justice in the administration of the immigration laws.

Of course, the ultimate determination of the effect of Afroyim is a matter for the courts. The act empowers the Attorney General, however, to determine Afroyim's effect on the act for administrative purposes.[3] This Statement of Interpretation will serve to guide both the Department of State and the Immigration and Naturalization Service in the

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[1]This provision was reenacted as section 349(a)(5) of the Immigration and Nationality Act, June 27, 1952, c. 477, 66 Stat. 267, 8 U.S.C. 1481(a)(5). The latter is therefore also unconstitutional under Afroyim.

[2]In Trop v. Dulles, 356 U.S. 86 (1958), the Court held unconstitutional section 349(a)(8) of the act, pertaining to desertion from the armed forces, and in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), it held unconstitutional section 349(a)(10), pertaining to leaving the United States to avoid military service. In Schneider v. Rusk, 377 U.S. 163 (1964), the Court invalidated section 352(a)(1), 8 U.S.C. 1484(a)(1), pertaining to residence in a foreign country by a naturalized citizen.

[3]Section 103(a) of the act, 8 U.S.C. 1103(a).

performance of their functions insofar as they involve questions of loss of citizenship.

1. Section 401(e) of the 1940 act had been ruled constitutional in the Court's earlier decision in Perez v. Brownell, 356 U.S. 44 (1958). The majority opinion in Perez rejected the argument that 'the power of Congress to terminate citizenship depends upon the citizen's assent.' 356 U.S. at 61. Afroyim expressly overruled Perez and held, in agreement with the Chief Justice's dissent in Perez, that the Government is without power to deprive a citizen of his citizenship for voting in a foreign election. 387 U.S. at 267. The rule laid down in Afroyim is that a United States citizen has a constitutional right to remain a citizen 'unless he voluntarily relinquishes that citizenship.' 387 U.S. at 268.

Afroyim did not expressly address itself to the question of defining what declarations or other conduct can properly be regarded as a "voluntary relinquishment" of citizenship. As a consequence, it did not provide guidelines of sufficient detail to permit me to pass definitely upon the validity of other expatriating provisions of the act. It did, however, stress the constitutional mandate that no citizen born or naturalized in the United States can be deprived of his citizenship unless he has "voluntarily relinquished" it.

On the question of what constitutes 'voluntary relinquishment," we must look to earlier cases in the Supreme Court. Some guidance may be found in earlier opinions of the Justices who joined in the Court's opinion in Afroyim. Particularly relevant are the Chief Justice's dissent in Perez, which was cited in Afroyim with approval, and the concurring opinion of Justice Black (who wrote the opinion of the Court in Afroyim) in Nishikawa v. Dulles, 356 US 129, 138 (1958), decided the same day as Perez.

In Perez, the Chief Justice stated (356 U.S. at 62-69; footnotes omitted):

"It has long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country. While the essential qualities of the citizen-state relationship under our Constitution preclude the exercise of governmental power to divest United States citizenship, the establishment of that relationship did not impair the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship. Nearly all sovereignties recognize that acquisition of foreign nationality ordinarily shows a renunciation of citizenship. Nor is this the only act by which the citizen may show a voluntary abandonment of his citizenship. Any action by which he manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status. In recognizing the consequences

of such action, the Government is not taking away United States citizenship to implement its general regulatory powers, for, as previously indicated, in my judgment citizenship is immune from divestment under these powers. Rather, the Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship."

In Nishikawa, Mr. Justice Black stated (356 U.S. at 139):

"Of course a citizen has the right to abandon or renounce his citizenship and Congress can enact measures to regulate and affirm such abjuration. But whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights. Although Congress may provide rules of evidence for such trials, it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality. Cf. Tot. v. United States, 319 U.S. 463. Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship."

The foregoing quotations do not come from majority opinions, and Afroyim does not adopt them. Indeed, Afroyim does not reach the question of whether it may be possible under some circumstances for allegiance to be transferred or abandoned without constituting a voluntary relinquishment of the status of citizenship. That question must await further court decision. Under any reading of Afroyim, however, it is clear that an act which does not reasonably manifest an individual's transfer or abandonment of allegiance to the United States cannot be made a basis for expatriation.

2. For administrative purposes, and until the courts have clarified the scope of Afroyim, I have concluded that it is the duty of executive officials to apply the act on the following basis. "Voluntary relinquishment" of citizenship is not confined to a written renunciation, as under section 349 (a)(6) and (7) of the act, 8 U.S.C. 1481(a)(6) and (7). It can also be manifested by other actions declared expatriative under the act, if such actions are in derogation of allegiance to this country. Yet even in those cases, Afroyim leaves it open to the individual to raise the issue of intent.

Once the issue of intent is raised, the act makes it clear that the burden of proof is on the party asserting that expatriation has occurred.[4] Afroyim suggests that this burden is not easily satisfied by the Government. In the words of Justice Black quoted above from his concurring opinion in Nishikawa, the voluntary performance of some acts can be

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[4]Section 349(c) of the act, added in 1961, 8 U.S.C. 1481(c)

"highly persuasive evidence in the particular case of a purpose to abandon citizenship." Yet some kinds of conduct, though within the proscription of the statute, simply will not be sufficiently probative to support a finding of voluntary expatriation.

For instance, it is obviously not enough to establish a voluntary relinquishment of citizenship that an individual accepts employment as a public school teacher in a foreign country. This I have already decided in the case of a dual national, Matter of Sally Ann Becher, 12 I&N. 380; Interim Decision 1771 (August 21, 1967). A different case would be presented by an individual's acceptance of an important political post in a foreign government.[5]

A similar approach can be taken with respect to service in a foreign army, depending on the particular circumstances involved. Thus, an individual who enlists in the armed forces of an allied country does not necessarily evidence that by so doing he intends to abandon his United States citizenship. But it is highly persuasive evidence, to say the least, of an intent to abandon United States citizenship if one enlists voluntarily in the armed forces of a foreign government engaged in hostilities against the United States.[6]

The examples mentioned above, are, of course, merely illustrative. In each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship. In order to avoid conflicts in interpretation between the Department of State and the Immigration and Naturalization Service, these agencies should undertake to consult with each other; if any substantial difference should arise as to any particular type of situation, it should be referred to the Attorney General for resolution.

3. Finally, note should be made as to the scope of this Statement of Interpretation. I believe the Afroyim principles reach, and therefore this Statement covers, all of section 349(a) of the act, section 350 insofar as it relates to dual nationals born or naturalized in the United States, and section 407(c) insofar as it purports to continue the effectiveness of individual losses of nationality under the similar provisions of sections 401 and 404 of the Nationality Act of 1940.

There are additional considerations relating to dual nationals born abroad which may affect their acquisition and

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[5] See section 349(a)(4)(A) and (B) of the act, 8 U.S.C. 1481 (a)(4)(A) and (B).

[6] See section 349(a)(3), 8 U.S.C. 1481(a)(3).

retention of United States citizenship.' This matter is currently in litigation.7 Hence this Statement does not necessarily apply to loss of United States citizenship acquired as a result of birth abroad to a citizen parent or parents.

This Statement has no application to a revocation of naturalization unlawfully procured. See Afroyim v. Rusk, 387 U.S. at 267, n.23.

RAMSEY CLARK.

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7 Mellei v. Rusk, awaiting decision in the United States District Court for the District of Columbia (No. 3002-67, decided Feb. 28, 1969; appeal to United States Supreme Court pending).

Appendix B

1600 South Eads Street
Apartment 416 S
Arlington, Virginia 22202
13 July 1970

Legal Advisor
Department of State
2201 C Street, NW
Washington, D.C.

Dear Sir:

On November 11, 1969, the Department of State issued a statement for the press (No. 337) concerning service by private United States citizens in foreign armed forces. In this release it was stated, in part:

> "The Department of State strongly opposes such involvement by private Americans as contrary to the foreign policy interests of the United States.
>
> ****
>
> The Department of State is actively considering whether there are additional steps that might be taken to support more fully the policy objectives of our Government on this matter."

In the context of a statement for the press on October 10, 1969 on the same subject, it would appear that the "additional steps" referred to would be something other than enforcement of Section 349(a)(3) of the Immigration and Nationality Act of 1952, which provides for loss of United States nationality for unauthorized service in the armed forces of a foreign state.

Could you advise me as to whether the Department of State has determined whether such "additional steps" exist and, if so, how I may be informed of them?

Thank you for your assistance in this matter.

Very truly yours,

G. L. Michael

Appendix C

Department of State
Washington, D.C. 20520

July 21, 1970

Mr. G.L. Michael
1600 South Eads Street
Apartment 416 S
Arlington, Virginia 22202

Dear Mr. Michael:

The Department has received your letter dated July 13, 1970 inquiring whether any additional steps have been taken in support of the opposition by the Department of State to the service by American citizens in the armed forces of foreign states.

Section 349 (a)(3) of the Immigration and Nationality Act of 1952, to which you refer has not been specifically invalidated by court decision, but the Supreme Court in Afroyim v. Rusk left in doubt whether such foreign military service in all cases would result in loss of United States citizenship. It is this area of doubt that has led the Department to consider additional measures. The Department continues strongly to oppose such involvement by private Americans as contrary to the foreign policy interests of the United States and this matter remains under continuing review.

Sincerely yours,

M. E. Malmberg
Assistant Legal Adviser
for Administration
and Consular Affairs